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CASES ON CONSTITUTIONAL LAW.

C A S E S
ON
CONSTITUTIONAL LAW.

WITH NOTES.

PART TWO.

BY
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PART II.

CHAPTER IV.

CITIZENSHIP.—FUNDAMENTAL CIVIL AND POLITICAL RIGHTS.—
THE LATER AMENDMENTS TO THE CONSTITUTION OF THE
UNITED STATES.

BARRON *v.* MAYOR, ETC. OF BALTIMORE.

SUPREME COURT OF THE UNITED STATES. 1833.

[7 *Pet.* 243; 10 *Curtis's Decisions*, 464.]

ERROR to the Court of Appeals of the western shore of the State of Maryland.

Case by the plaintiff in error against the city of Baltimore, to recover damages for injuries to the wharf-property of the plaintiff, arising from the acts of the corporation.

The city, in the asserted exercise of its corporate authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water, which flow from the range of hills bordering the city, and diverted them, so that they made deposits of sand and gravel near the plaintiff's wharf, and thereby rendered the water shallow, and prevented the access of vessels. The decision of Baltimore County Court was against the defendants, and a verdict for \$4,500 was rendered for the plaintiff. The Court of Appeals reversed the judgment of Baltimore County Court, and did not remand the case to that court for a further trial. From this judgment the defendant in the Court of Appeals prosecuted a writ of error to this court.

Mayer, for the plaintiffs.

Taney and *Scott*, *contra*, were stopped by the court.

MARSHALL, C. J., delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the Judicial Act. 1 Stats. at Large, 85.

The plaintiff in error contends that it comes within that clause in the

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In an action against the city to recover damages the county court rendered a verdict for the plaintiff.

The city of Baltimore had diverted certain streams of water from their accustomed course so that they made deposits of sand and gravel near the plaintiff's wharf and thereby rendered the water shallow and prevented the access of vessels.

fifth amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and, in that Constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to

The state were jealous of the power of the gen. govt.
The amendments, first ten of them, were passed to restrain

restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the 9th section, however comprehensive its language, contains no restriction on State legislation.

The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the 10th proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," &c. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms; the restrictions contained in the 10th section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the 9th and 10th sections of the 1st article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent, — some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by

tendency - a tendency to extend the power of the federal govt. so as to protect citizens against the power of their own states.

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the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two thirds of Congress, and the assent of three fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion, that there is no repugnancy between the several Acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

CORFIELD v. CORYELL

CIRCUIT COURT OF THE UNITED STATES FOR PENNSYLVANIA. 1825.

[4 Wash. C. C. 371.]

THIS was an action of trespass for seizing, taking, and carrying away, and converting to the defendant's use, a certain vessel, the property of the plaintiff, called the "Hiram." Plea not guilty, with leave to justify. The case, as proved at the trial, was as follows: . . . [Here it is stated that the plaintiff was owner of the "Hiram," a vessel licensed as a coaster, which, being let to one Keene, proceeded from Philadelphia in May, 1821, to certain oyster beds in the waters of New Jersey, and was there seized while dredging for oysters; and was condemned and sold by judicial proceedings under the laws of New Jersey. The defendant acted as "prize master" in the seizure.]

WASHINGTON, J., after stating to the jury the great importance of many of the questions involved in this cause, recommended to them to find for the plaintiff, and assess the damages; subject to the opinion of the court upon the law argument of the facts in the cause.

Verdict for \$560, subject, &c.

This case was argued, on the points of law agreed by the counsel to arise on the facts, at the October term, 1824, and was taken under advisement until April term, 1825, when the following opinion was delivered:

WASHINGTON, J., delivered the opinion of the court. The points reserved present, for the consideration of the court, many interesting and difficult questions, which will be examined in the shape of objections made by the plaintiff's counsel to the seizure of the "Hiram," and the proceedings of the magistrates of Cumberland County, upon whose sentence the defendant rests his justification of the alleged trespass. These objections are, —

First. That the Act of the Legislature of New Jersey of the 9th of June, 1820, under which this vessel, found engaged in taking oysters in Morris River Cove by means of dredges, was seized, condemned, and sold, is repugnant to the Constitution of the United States in the following particulars:

1. To the eighth section of the first article, which grants to Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

2. To the second section of the fourth article, which declares, that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

3. To the second section of the third article, which declares, that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction.

for the reason, among others, that it violated that clause of the Const (Art 4 S. 2) which declares that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Trespass for seizing a vessel of the plaintiff. The licensed coaster.

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In case the Act should be considered as not being exposed to these constitutional objections, it is then insisted,

Secondly. That the *locus in quo* was not within the territorial limits of New Jersey. But if it was, then

Thirdly. It was not within the jurisdiction of the magistrates of Cumberland County.

Fourthly. We have to consider the objection made by the defendant's counsel to the form of this action.

The first section of the Act of New Jersey declares, that, from and after the 1st of May, till the 1st of September in every year, no person shall rake on any oyster bed in this State, or gather any oysters on any banks or beds within the same, under a penalty of \$10.

Second section. No person residing in, or out of this State, shall, at any time, dredge for oysters in any of the rivers, bays, or waters of the State, under the penalty of \$50.

The third section prescribes the manner of proceeding, in cases of violations of the preceding sections.

The two next sections have nothing to do with the present case.

The sixth section enacts, that it shall not be lawful for any person, who is not, at the time, an actual inhabitant and resident of this State, to gather oysters in any of the rivers, bays, or waters in this State, on board of any vessel, not wholly owned by some person, inhabitant of, or actually residing in this State; and every person so offending, shall forfeit \$10, and shall also forfeit the vessel employed in the commission of such offence, with all the oysters, rakes, &c., belonging to the same.

The seventh section provides, that it shall be lawful for any person to seize and secure such vessel, and to give information to two justices of the county where such seizure shall be made, who are required to meet for the trial of the said case, and to determine the same; and in case of condemnation, to order the said vessel, &c. to be sold.

The first question then is, whether this Act, or either section of it, is repugnant to the power granted to Congress to regulate commerce? . . .

2. The next question is, whether this Act infringes that section of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States"?

The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every

State. That does not make him a citizen of that State. A citizen of one State is not a citizen of all the

kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union."

But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens.

A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the State against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the State. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.

This power in the Legislature of New Jersey to exclude the citizens of the other States from a participation in the right of taking oysters within the waters of that State, was denied by the plaintiff's counsel, upon principles of public law, independent of the provision of the Constitution which we are considering, upon the ground that they are incapable of being appropriated until they are caught. This argu-

When one goes into a state has a right not to be discriminated against. It includes the right to become a citizen of the state later. a right to come under the laws regulating election to office &c. See page 80 - which is wrong

ment is unsupported, we think, by authority. Rutherford, b. 1, ch. 5, sect. 4 and 5, who quotes Grotius as his authority, lays it down, that, although wild beasts, birds, and fishes, which have not been caught, have never in fact been appropriated, so as to separate them from the common stock to which all men are equally entitled, yet where the exclusive right in the water and soil which a person has occasion to use in taking them is vested in others, no other person can claim the liberty of hunting, fishing, or fowling, on lands, or waters, which are so appropriated. "The sovereign," says Grotius, b. 2, ch. 2, sect. 5, "who has dominion over the land, or waters, in which the fish are, may prohibit foreigners [by which expression we understand him to mean others than subjects or citizens of the State] from taking them."

That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that State, in express terms, to the United States, is admitted by the counsel for the plaintiff; and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the State, for the use of the citizens thereof; it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the State, to the citizens of all the other States. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to a State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other States from taking them, except under such limitations and restrictions as the laws may prescribe. . . .

Fourthly. . . . The objections to this form of action are fatal. . . . The "Hiram" then, having been lawfully in possession of Keene, under a contract of hiring for a month, which had not expired at the time the alleged trespass was committed, the action cannot be supported.

Let judgment be entered for the defendant.

Charles J. Ingersoll and J. R. Ingersoll, for plaintiffs.

McIlvaine and Condy, for defendants.¹

¹ And so *McCready v. Va.*, 94 U. S. 391. See also *Conner v. Elliott*, 18 How. 591; *Paul v. Va.*, 8 Wall. 168; *Ward v. Md.*, 12 Wall. 418; *Slaughter House Cases*, 16 Wall. 36; *Lemmon v. People*, 20 N. Y. 502, 607. — ED.

ROBY v. SMITH ET AL.

SUPREME COURT OF INDIANA. 1891

[131 Ind. 342.]

FROM the Steuben Circuit Court. *D. R. Best, E. A. Bratton, and W. F. Elliott* for appellant. *J. A. Woodhull and W. A. Brown* for appellees.

MILLER, J. This action was brought by the appellant, Frank S. Roby, trustee, to foreclose a mortgage on real estate situate in Steuben County, in this State. . . . Demurrers filed by each of the defendants were sustained to the complaint, and final judgment rendered on demurrer for the defendants.

The ruling upon the demurrer is the only question in the record. The correctness of this ruling depends upon the validity and construction to be given to section 2988, R. S. 1881, in force since May 31, 1879, which is as follows: "It shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills), for any purpose whatever, who shall not be at the time a bona fide resident of the State of Indiana; and it shall be unlawful for any person who is not a bona fide resident of the State to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the State, then his rights, powers, and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the provisions of the Act to which this is supplemental." The constitutionality of this Act is vigorously assailed by counsel for the appellant. It is claimed that this Act limits the constitutional rights of citizens of this State to select and appoint their own agents in the control and management of their own property, which is one of the inherent and inalienable rights of a citizen. The facts of this case do not require us to enter into a discussion of this question. The contract was entered into in the State of Michigan, by and between citizens of that State, to secure an indebtedness expressly payable in that State. It was to all intents and purposes a Michigan contract, except that, the land being situate within this State, the mortgage, which is a qualified conveyance of real estate, is subject to the law of the State, so far as it affects the validity and enforcement of the lien. 1 Jones, Mortg. § 662. The rights of the citizens of this State to appoint non-resident trustees are not involved in this case.

Another question involved in the consideration of the constitutionality of the Act under consideration may be excluded from the present discussion: that is, the right of a non-resident trustee to prosecute in the courts of this State actions affecting the trust property. We infer from the last clause of the section that it was the purpose of the legislature in enacting this statute to compel trustees to reside within the State in order to bring them within the process and subject to the control of the immunities of citizens of the several states.

Held that a law of Indiana making it unlawful for any person who was not a bona fide resident of that state to act as a trustee in any deed or mortgage for any purpose was in conflict with the provision of the Constitution of the U. S. which guaranties to the citizens of each state all the privileges and

State courts. In the present action the suit was brought by a resident trustee, who owed his appointment to the order of the court, and not to the act of the parties.

We have remaining for determination the question, does or does not this Act, as applied to the facts disclosed in the record, impair the privileges and immunities of citizens of another State, or of the United States, as guaranteed in article 4, § 2, and the Fourteenth Amendment of the Constitution of the United States? The constitutionality of this Act has never been passed upon by this court, although the question seems more than once to have been in the mind of the court. In holding that this Act did not apply to trustees appointed prior to the passage of the Act, the court in *Thompson v. Edwards*, 85 Ind. 414, said: "Waiving all discussions as to the power of the legislature to enact such a statute as applicable to trustees to be thereafter appointed, it is manifest," etc. In *Bryant v. Richardson*, 126 Ind. 145-153, it is said that it "may well be doubted" if that portion of this statute which applies to natural persons, and seeks to prohibit them from naming a person who is a non-resident of the State to act as a trustee for them, is valid. In *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. Rep. 146, GRESHAM, J., said of this statute: "It is a statute which denies to residents of other States the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the State, power to convey to any person in trust, not a resident of Indiana, real or personal property within the State. This is a plain discrimination against the residents of other States. If Indiana may disqualify a resident of another State from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the State might prohibit citizens of other States from holding property within the State, and to that extent from doing business within the State. No State can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real and personal property in any State of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship." Section 2, of article 4, of the Constitution of the United States, declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." "Attempt will not be made," say the Supreme Court of the United States in *Ward v. Maryland*, 12 Wall. 418, "to define the words 'privilege and immunities,' or specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say

that the clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate." In that case, one of the trustees, at the time of the creation of the trust, was a resident of the State. The resident trustee having died, the action was prosecuted by the surviving and non-resident trustee. The fact that the language above cited was not strictly essential to the determination of the case before the court may impair the force of the decision as an authority, but it does not detract from the potency of its reasoning.

Reluctant as we are to hold a statute regularly enacted by the General Assembly unconstitutional, we cannot avoid the conclusion that the Act under consideration is in conflict with those provisions of the Constitution of the United States which guarantee to the citizens of each State, and of the United States, all the privileges and immunities of citizens of the several States. The judgment is reversed, with costs, and cause remanded for further proceedings in accordance with this opinion.

ELLIOTT, C. J., did not sit, and took no part in the decision of this case.

IN *Minor v. Happersett*, 21 Wall. 162 (1874), on error to the Supreme Court of Missouri, it was declared by the Supreme Court of the United States (WARRE, C. J.) that the Fourteenth Amendment did not secure to women the right of suffrage. "The question is presented," said the court, "in this case, whether, since the adoption of the Fourteenth Amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the Constitution and laws of the State, which confine the right of suffrage to men alone." <We might, perhaps, decide the case upon other grounds, but this question is fairly made.> From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations, and proceed at once to its determination. . . .

"To determine, then, who were citizens¹ of the United States before

¹ In the usage of English-speaking people, the word "citizen," in the sense of membership of the State, is quite modern. "The term 'citizen,'" said Mr. Justice Daniel, in a dissenting opinion in *Rundle v. Delaware Canal Co.*, 14 Howard, 80, 97 (1852), "will be found rarely occurring in the writers of English law." The word is, indeed, familiar enough in our older reports, law-books, and general literature as designating the member of a borough. For instance, in *R. v. Hanger*, 1 Rolle, 138 (1614-15), the rights of "un citizen de London," are elaborately considered by Coke, C. J., with many references to the Year Books. "Sont 5 sorts de Citizens," he says, etc. So Blackstone (1 Com. 174): "As for the [parliamentary] electors of citizens and burgesses,

existed at the time it was adopted. If it had been the intention to make all citizens of the U. S. voters the framers of the Const. would not have left so in-

Had that the 14th amend did not confer the right to vote on women. The constitution has not added the right of suffrage to the privileges and immunities of citizenship as they

they are citizens. Infants are citizens but can not vote. The word citizen was a novel one. In Eng.

the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

"Looking at the Constitution itself, we find that it was ordained and established by 'the people of the United States' (Preamble, 1 Stat. at Large, 10); and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Declaration of Independence, 1 Stat. at Large, 1), and that had by Articles of Confederation and Perpetual Union, in which they took the name of 'the United States of America,' entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. Articles of Confederation, § 3; 1 Stat. at Large, 4.

"Whoever, then, was one of the people of either of these States when

these are supposed to be the mercantile part or trading interest of the kingdom." And in Shakespeare (*As You Like It*, Act II., sc. 1), when the banished Duke, having proposed to "go and kill us venison," adds, —

"And yet it irks me the poor dappled fools,
Being native burghers in this desert city,
Should in their own confines," etc., —

we hear just afterwards of Jaques moralizing in the forest over a wounded deer, "left and abandoned of his velvet friends": —

"Ay, quoth Jaques,
Sweep on, you fat and greasy citizens."

The proper English meaning of the term "citizen" imported membership of a borough or local municipal corporation. The usual word for a man's political relation to the monarch or the State was "subject." In France, the corresponding phrase *citoyen, concitoyen*, seems to have long been familiar, in the modern sense of the word "citizen."

The word "citizen" is not found in any of our State constitutions before that of Massachusetts (1780); and it was not in the rejected Massachusetts Constitution of 1778. In the Declaration of Independence (1776), we read it once: "He has constrained our fellow-citizens," etc., and once in the Articles of Confederation (1781). In the treaty with France of 1778, the usual phrase is "subjects," "people," or "inhabitants;" but "citizens" does occur as applicable to the United States. In the treaty with Great Britain of 1782, it is used in a marked way: "There shall be a . . . peace between his British majesty and the said States, and between the subjects of the one and the citizens of the other."

In the Massachusetts Constitution (1780), the word occurs, but more sparingly than would be expected in a similar document now. In the Federal Constitution, prepared in 1787, it is freely used.

It seems, then, to have been the events which happened in this country in the eighth and ninth decades of the last century which first brought the word "citizen," in our modern sense of it, into familiar English speech. See *Minor v. Happersett*, 21 Wall. 162, 166. For interesting indications of a certain perplexity felt in Europe, in 1784, as to our understanding of the term, see 3 Works of John Adams, 213.

Compare Blackstone, *infra*, p. 464, note. — Ed.

the Constitution of the United States was adopted, became *ipso facto* a citizen, — a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

“Additions might always be made to the citizenship of the United States in two ways, — first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides (Article 2, § 1) that ‘no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President’ (Article 1, § 8), and that Congress shall have power ‘to establish a uniform rule of naturalization.’ Thus new citizens may be born or they may be created by naturalization.

“The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words ‘all children’ are certainly as comprehensive, when used in this connection, as ‘all persons,’ and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact, the whole argument of the plaintiffs proceeds upon that idea.

“Under the power to adopt a uniform system of naturalization Congress, as early as 1790, provided ‘that any alien, being a free white person, might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens. 1 Stat. at Large, 103. These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born, or thereafter to be born, out of the limits of the jurisdiction of the United States, whose fathers were, or should be at the time of their birth, citizens of the United States, were declared to be citizens also. 10 Stat. at Large, 604.

“ As early as 1804 it was enacted by Congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath (2 Stat. at Large, 293) ; and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or who should be married, to a citizen of the United States, should be deemed and taken to be a citizen. 10 Stat. at Large, 604. . . .

“ If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters. . . .

“ It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

“ When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions, we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, ‘every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request,’ were its voters ; in Massachusetts, ‘every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds ;’ in Rhode Island, ‘such as are admitted free of the company and society’ of the colony ; in Connecticut, such persons as had ‘maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate,’ if so certified by the selectmen ; in New York, ‘every male inhabitant of full age who shall have personally resided within one of the counties of the State for six months immediately preceding the day of election, . . . if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State ;’ in New Jersey, ‘all inhabitants . . . of full age who are

worth fifty pounds, proclamation money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election;’ in Pennsylvania, ‘every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax which shall have been assessed at least six months before the election;’ in Delaware and Virginia, ‘as exercised by law at present;’ in Maryland, ‘all freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election;’ in North Carolina, for Senators, ‘all freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election,’ and for members of the House of Commons, ‘all freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes;’ in South Carolina, ‘every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot of which he hath been legally seised and possessed at least six months before such election, or (not having such freehold or town lot) hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government;’ and in Georgia, such ‘citizens and inhabitants of the State as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county.’

“In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared. . . .

“The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1788, and finally by the thirteen original States in 1790. Vermont was the first new State admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. The next year, 1792, Kentucky followed with a constitution

confining the right of suffrage to free male citizens of the age of twenty-one years, who had resided in the State two years, or in the county in which they offered to vote one year next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the State, or freemen being inhabitants of any one county in the State six months immediately preceding the day of election. But we need not particularize further. No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

"Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may, under certain circumstances, vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas. . . ."

"Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

Affirm the judgment."

NOTE.

NATIVES, ALIENS, CITIZENS.

"The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or liamen, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. . . ."

"But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties, of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. . . .

"Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection: at a time, too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France, or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. . . .

"Local allegiance is such as is due from an alien or stranger born, for so long time as he continues within the king's dominion and protection: and it ceases the instant such stranger transfers himself from this kingdom to another. . . .

"When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions; so that a particular Act of Parliament became necessary after the Restoration, 'for the naturalization of children of his Majesty's English subjects, born in foreign countries during the late troubles.' And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the King of England's allegiance, represented by his father the ambassador. . . .

"A denizen is an alien born, but who has obtained *ex donatione regis* letters-patent to make him an English subject: a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. . . .

"Naturalization cannot be performed but by Act of Parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the Privy Council, or Parliament, holding offices, grants, &c. . . .

"These are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endeavored since the commencement of this century to lay almost totally aside, by one general Naturalization Act for all foreign Protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5; but this, after three years' experience of it, was repealed by the statute 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad." — 1 BLACKSTONE'S *Com.* 366.

See also SIR THOMAS SMITH'S *Com. of England*, book i. cc. 16, 22-24 (1565).

"I. NATIVES AND ALIENS. . . . We have to consider (1) the difference between natives, or members of the State or nation, and foreigners; (2) the difference between citizens and other members of the nation. We need not consider the different grades within the citizen body till we discuss the Constitution in detail. . . .

"Nationality may be determined by —

"(a) Place of birth (*Geburtsort*). This is in the main the later mediæval view, and is still the principle of English law, which distinguishes 'natural-born' subjects from

'aliens.' Birth on an English ship or in an English embassy is equivalent to birth in England. But the principle has been so far modified that the children of Englishmen, born abroad, become English citizens: and naturalization has become much easier. The law of the United States goes on the same principles.

"(b) Domicil. This form of the territorial principle is more in keeping with modern ideas, because it lays stress not on the casual place of birth, but on the permanent domicile of the parents, and subsequently of the man himself. But here differences arise, according as settlement is made easy or difficult. This was the principle partially followed by Austria in earlier times and by individual German States. But there, too, it was modified by the forms of a personal grant of native rights.

"(c) Midway between these comes the Swiss principle of membership in the commune, which forms the basis of membership of the Canton (*Cantonsbürgerrecht*), and of the Swiss confederation (*Schweizerbürgerrecht*). The rights in the commune depend not on place of birth or domicile, but on descent from parents who are citizens of the commune, even though they live outside it. It is not unlike the old Roman municipal law, which was also based on *origo* from a particular *municipium*.

"(d) Modern States, generally, recognize nationality as a personal relation, not mainly dependent on place of birth or domicile, but on descent from members of the nation and personal reception into its membership. Place of birth and domicile come in to complete the notion.

"This, in the main, is the principle for France, Prussia, and the German Empire. This system best corresponds to modern political ideas, which regard the personal relation to the nation as the essential germ of the conception of the State.

"But the different systems tend to approach and supplement one another. Descent, birthplace, domicile and naturalization, marriage and legitimation, thus all combine, directly or indirectly, to constitute the qualification for citizenship. . . .

"It is quite possible for one person to have the rights of a native (*Heimatsrechte*) in two States at once, and modern conditions indeed encourage this. In the rare case of a conflict of duties it may be hard to reconcile them. It is not always a safe principle that the earlier right should take precedence, especially where it is dormant, while the later right is actual. In such cases the first duty, *e.g.*, of military service, is to the country in which a man is living. . . .

"In private law the distinction between citizen and alien used to be far more important than now. The spheres of private and public law are now much more sharply distinguished, and hence nationality, which is essentially a political idea, has no place in private law. As a rule natives and aliens are alike regarded as both possessing full rights in private law. . . .

"But in the sphere of public law the distinction between citizen and alien remains in full force. The following rights, except in case of special grant, are confined to natives:— (*but not necessarily conferred upon natives*)

"(a) The right of permanent residence in the country. A native cannot be handed over to a foreign State, or banished, without grave political reasons.

"(b) The right to the protection of his State, even if he is staying abroad.

"(c) The exercise of the franchise and of the rights of a full citizen.

"(d) The right to hold a public office.

"(e) Sometimes such general political rights as those of association, petition, or free publication. This does not mean that foreigners are absolutely excluded from these rights, but that they only enjoy them on sufferance.

" . . . II. CITIZENS. The body of full citizens rise above the general mass of the members of a country or nation. Full citizenship implies membership in the nation, but, more than that, it implies complete political rights: it is thus the fullest expression of the relation of the individual to the State.

"Its conditions have varied from time to time: in ancient Greece and Rome it depended on citizenship in the governing city, in the Middle Ages on freedom (*Volksfreiheit*), and later on the rights of a privileged class, and on landed property. In modern States it has often become almost coextensive with membership in the nation (*Volks-genossenschaft*).

"The following limitations are now generally recognized:—

"1. Women are excluded (see above, ch. xx.).

"2. Minors are excluded, on the ground that the exercise of political rights demands mature judgment.

"Some modern States fix the majority for political purposes at a different age from that of private law. There is some reason for fixing it later, for it is easier to judge clearly on ordinary matters than on politics. In France, England, North America and Italy political and civil majority are both fixed at twenty-one, and in some German States also, *e.g.*, Bavaria; but in Prussia, the German Empire, Spain and Portugal, the qualification for a vote is twenty-five years, in Austria twenty-four. In Switzerland some cantons fix the political majority earlier than the civil, generally at the completion of the twentieth year.

"3. Various persons are excluded whose civil status has been impaired or lost—*e.g.*, criminals, declared spendthrifts, bankrupts, or persons in receipt of poor-relief.

"Many States require further qualifications:—

"4. A certain degree of outward independence, variously defined in different States. In earlier German law the qualification was occupation of land or separate household ('a hearth of one's own'): in recent German law independent occupation and active membership in a commune. The former view has prevailed in England and some States of North America, the latter has found a place in modern German constitutions. It excludes all hired servants, often too the workers in factories, at least the lower class of them, and most journeymen craftsmen.

"Other modern States have moved in the direction of universal suffrage, and relaxed or abolished this qualification. Such are the Swiss constitutions since 1830, the constitutions of the French Republics of 1848 and 1870; of the French Empire, the North-German Confederation of 1867, the German Empire of 1871, and the Greek Constitution of 1864. The United States are following the same democratic tendency of the age.

"5. In some States citizen rights are conditional on the possession of a certain amount of property. It is quite right to make property an important factor in the distribution of voting power, but it is a violation of the idea of the State to exclude a man from the rights of a citizen on the ground of insufficient property, provided that he is morally and mentally capable of taking part in public duties, and is in an independent position. If property is interpreted to mean income or earnings, and the limit is put at a modest subsistence, there is no objection to it, but it is then equivalent to the preceding qualification. The result is the same in constitutions such as those of the United States, the Bavarian of 1848, and to some extent those of Austria and Prussia, where the franchise depends on payment of direct taxes.

"6. In Christian States, till lately, a profession of Christianity was required. Jews, Mohammedans and others, though tolerated, were excluded from political rights. During the Middle Ages religion and law, Church and State, were closely associated. Exclusion from the religious society meant exclusion from the political. Toleration was the utmost that unbelievers could hope for. Even within the Christian pale difference of faith carried with it political consequences. In some countries only Catholics, in others only Protestants, acquired full rights. The peace of Westphalia put Catholics and Protestants, in Germany, on an equality of civil rights, but not for political.

"The German Confederation of 1815 established political equality for the recognized religious parties in Germany, Catholics, Lutherans, and Calvinists (*Reformirten*), but left the position of other sects uncertain.

"In modern States there is a decided tendency to make the exercise of political rights entirely independent of religious creed. This is by no means entirely due to religious indifference. When the American Congress of 1789 forbade the passing of any law establishing a dominant religion, it did not mean that it was indifferent to the power of Christianity, nor did it intend to hinder the State in its duty of supporting Christian institutions." . . . — BLUNTISCHLI, *Theory of the State*, Clarendon Press Translation (1885), 195. — Ed.

see page

In *Pembina Mining and Milling Co. v. Pa.* 125 U. S. 181 (1887), the question was on the validity of a Pennsylvania statute requiring an annual license fee from a foreign corporation which "does not invest and use its capital in this Commonwealth." In holding it good, FIELD, J., for the court, said: "The clauses of the Federal Constitution, with which it was urged in the State Supreme Court that the statute conflicts, are the one vesting in Congress the power to regulate foreign and interstate commerce, the one declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several States, and the one embodied in the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws."

"1. It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. . . .

"2. Nor does the clause of the Constitution declaring that the 'citizens of each State shall be entitled to all privileges and immunities of citizens in the several States' have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause. This was expressly held in *Paul v. Virginia*. In that case it appeared that a statute of Virginia, passed in February, 1866, declared that no insurance company not incorporated under the laws of the State should carry on business within her limits without previously obtaining a license for that purpose, and that no license should be received by the corporation until it had deposited with the treasurer of the State bonds of a designated character and amount, the latter varying according to the extent of the capital employed. No such deposit was required of insurance companies incorporated by the State for carrying on their business within her limits.

A subsequent statute of Virginia made it a penal offence for a person to act in the State as an agent of a foreign insurance company without such license. One Samuel Paul, having acted in the State as an agent for a New York insurance company without a license, was indicted and convicted in a Circuit Court of Virginia, and sentenced to pay a fine of \$50. On error to the Court of Appeals of the State the judgment was affirmed, and to review that judgment the case was brought to this court. Here it was contended, as in the present case, that the statute of Virginia was invalid by reason of its discriminating provisions between her corporations and corporations of other States; that in this particular it was in conflict with the clause of the Constitution mentioned, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. But the court answered, that corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed; that the privileges and immunities secured to citizens of each State in the several States by the

not decided: not that corp. person paying the tax may be entitled to privileges a person

is not decided that corp is citizen

seem. statute required an annual license from foreign corp. the was held.

Corporations are not citizens within the meaning of the 14th amendment. Upon paying the required license tax this corp could claim

a corp. tion is a citizen within the meaning of the amendment a special privilege enjoyed by the citizens of the State not as to the other by virtue of the Constitution amendment

any other corp. having a similar office could claim.
a state is not prohibited from discriminating in the

clause in question are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their citizenship; that special privileges enjoyed by citizens in their own States are not secured in other States by that provision; that it was not intended that the laws of one State should thereby have any operation in other States; that they can have such operation only by the permission, express or implied, of those States; that special privileges which are conferred must be enjoyed at home, unless the assent of other States to their enjoyment therein be given; and that a grant of corporate existence was a grant of special privileges to the corporations, enabling them to act for certain specified purposes as a single individual, and exempting them, unless otherwise provided, from individual liability, which could therefore be enjoyed in other States only by their assent. In the subsequent case of *Ducat v. Chicago*, 10 Wall. 410, the court followed this decision, and observed that the power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, was clearly established by it and the previous case of *Augusta v. Earle*, 13 Pet. 519, and added that 'as to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.' *Philadelphia Fire Association v. New York*, 119 U. S. 110, 120.

"3. The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution [as] to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' *Providence Bank v. Billings*, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment

A corp. is a person under the meaning of the 14th amendment, but not a citizen.

The power to be a corp. is a special privilege conferred by

necessarily call for a decision that the corp. is a person. In truth it never has been decided that a corp. is a person

NOTE ON CORPORATIONS. within [CHAP. IV.

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requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amendment see *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri v. Lewis*, 101 U. S. 22, 30; *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512; *Yick Wo v. Hopkins*, 118 U. S. 356; *Hayes v. Missouri*, 120 U. S. 68.

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions, for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority."

Judgment affirmed.¹

Mr. JUSTICE BRADLEY was not present at the argument of this cause and took no part in its decision.

it is not a discrimination

NOTE.

"This eleventh section [of the Judiciary Act of 1789] deals only with citizens, and it has been from first to last admitted that corporations are not citizens. They are political beings, created by the law, and cannot sustain the character of citizens. . . .

"I suppose it may fairly be said, that neither the framers of the Constitution nor the framers of the Judiciary Act had corporations in view. . . . When this subject first came before the Supreme Court, they took a pretty rigid view of it. They considered that a corporation created by the law of a particular State was like a partnership; it had some privileges which partnerships had not, but in substance they considered it to be a partnership and they went on from that view to this inference: that if all the members of a corporation were citizens of one State, and the party on the other side was a citizen of a different State, by alleging that fact jurisdiction could be obtained. This was held in the case of *The Bank of the United States v. Deveaux*, 5 Cranch, 61;

¹ Compare *Horn Silver Mining Co. v. N. Y.* 143 U. S. 305. — Ed.

also 161 U.S. R. 545 - which collects the cases speaking
of the power of a corp. to sue in a federal court.

CHAP. IV.]

NOTE.

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and in the case of *The Hope Insurance Company v. Boardman*, in the same book, page 57. The two cases were considered together; and it was repeated afterwards, so late as the case of *The Bank of Vicksburg v. Slocumb*, 14 Peters, 60. Now, you will readily see that there were very few cases of large corporations where all the members were citizens of one State, and that, if it were necessary to aver that fact on the record, the jurisdiction of the courts of the United States would have a very narrow application to corporations. I suppose there is no considerable corporation created by either of the States in which there are not one or more persons who are stockholders outside of the State. Well, this was a difficulty which had been encountered before in the history of the law. If you should take the trouble to look into Mr. Maine's admirable book on the History of Ancient Law, you will find mentioned there three cases of an analogous character. The first arose under the Roman law, where it was necessary, in order to give their important courts jurisdiction, to allege that the plaintiff was a Roman citizen; but after the commerce of the city and the empire became so extended, and such a number of foreigners had important rights and interests to be vindicated in the courts, they introduced what they called 'a fiction' (*fictio*), which meant that anybody who had a proper cause of complaint might allege that he was a Roman citizen, and that allegation should not be denied. In other words, they introduced, by their own authority, a rule that a falsehood might be stated on the record, and that the other party could not allege the truth. Well, there were two instances in England like this. One was where the Court of Exchequer obtained a great amount of jurisdiction by an allegation in the declaration that the plaintiff was a debtor to the king, and could not pay his debt unless the court would help him to recover what he demanded in that action; and that allegation was held not to be traversable. A similar allegation was permitted by the Court of King's Bench, in order to obtain jurisdiction as against the Common Pleas; that the plaintiff was in the custody of the marshal of the Court of King's Bench, and consequently could not go into any other court and prosecute his rights. That was held not to be traversable. Now, I want to bring your attention to the case of *The Ohio and Mississippi Railroad Company v. Wheeler*, 1 Black, 286, and you will see how this decision corresponds with the progress made by the Roman and English courts on similar subjects. Some parts of the marginal note express clearly what I wish to bring to your attention: 'A corporation exists only in contemplation of law and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created, and it must dwell in the place of its creation.' All that had been previously settled, and is unquestioned law. 'A corporation is not a citizen within the meaning of the Constitution, and cannot maintain a suit in the courts of the United States against a citizen of a different State from that by which it was created, unless the persons who comprise the corporate body are all citizens of that State.' That is the old law. 'In such cases, they may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as the joint suit of individual persons, united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against the citizen of any State.' That is the old law also.

"Where a corporation is created by the laws of a State" (we now advance to some new doctrine), 'the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence.' That is laid down as a legal presumption.

"A suit by or against a corporation in its corporate name may be presumed to be a suit by or against citizens of the State which created the corporate body, and no averment or denial to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States." There is the Roman 'fiction.' The court first decides the law, presumes all the members are citizens of the State which created the corporation, and then says you shall not traverse that presumption; and that is the law now. Under it, the courts of the United States constantly entertain suits by or against corporations. It has been so frequently settled, that there is not the slightest reason to suppose that it will ever be departed from by the court. It has been repeated over and over again in subsequent decisions; and the Supreme Court

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seems entirely satisfied that it is the right ground to stand upon; and, as I am now going to state to you, they have applied it in some cases which go beyond, much beyond, these decisions to which I have referred. So that when a suit is to be brought in a court of the United States by or against a corporation, by reason of the character of the parties, you have only to say that this corporation (after naming it correctly) was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that is exactly the same in its consequences as if you could allege, and did allege, that the corporation was a citizen of that State. According to the present decisions, it is not necessary you should say that the members of that corporation are citizens of Massachusetts. They have passed beyond that. You have only to say that the corporation was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that makes it, for the purposes of jurisdiction, the same as if it were a citizen of that State." — CURTIS, *Jurisd. U. S. Courts*, 127-133.¹

"It is certain that the Constitution and statute law of New York (Const. art. 2, N. Y. Revised Statutes, i. 126, sec. 2) speaks of men of color as being *citizens*, and capable of being freeholders, and entitled to vote. And if, at common law, all human beings born within the allegiance of the king, and under the king's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to the United States, in all cases in which there is no express constitutional or statute declaration to the contrary. Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural-born subjects. Subjects and citizens are, in a degree, convertible terms as applied to natives; and though the term citizen seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, subjects, for we are equally bound by allegiance and subjection to the government and law of the land. The privilege of voting, and the legal capacity for office, are not essential to the character of a citizen, for women are citizens without either; and free people of color may enjoy the one, and may acquire and hold and devise and transmit, by hereditary descent, real and personal estates. The better opinion, I should think, was, that negroes or other slaves, born within and under the allegiance of the United States, are natural-born subjects, but not citizens. Citizens, under our Constitution and laws, mean free inhabitants, born within the United States, or naturalized under the law of Congress. If a slave, born in the United States, be manumitted, or otherwise lawfully discharged from bondage, or if a black man be born within the United States, and born free, he becomes thenceforward a citizen, but under such disabilities as the laws of the States respectively may deem it expedient to prescribe to free persons of color." — 2 KENT'S *Com.* 258, n.

¹ Reprinted by permission. This book, published in 1880, consists of a course of lectures given by Judge Curtis at the Harvard Law School in 1872-73. — ED.

STATE v. MANN.

SUPREME COURT OF NORTH CAROLINA.

[2 Dev. 263.]

Def't. was indicted
for an assault and
battery upon Lydia,
the slave of E. J.

THE defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones.

On the trial it appeared that the defendant had hired the slave for a year — that during the term, the slave had committed some small offence, for which the defendant undertook to chastise her — that while in the act of so doing, the slave ran off, whereupon the defendant called upon her to stop, which being refused, he shot at and wounded her.

His Honor, JUDGE DANIEL, charged the jury, that if they believed the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offence committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave.

A verdict was returned for the State, and the defendant appealed.

No counsel appeared for the defendant. The Attorney-General contended, that no difference existed between this case and that of *The State v. Hall*, 2 Hawks, 582. In this case the weapon used was one calculated to produce death. He assimilated the relation between a master and a slave, to those existing between parents and children, masters and apprentices, and tutors and scholars, and upon the limitations to the right of the superiors in these relations, he cited Russell on Crimes, 866.

RUFFIN, J. A judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own, exist and are thoroughly understood. The struggle, too, in the judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless, however, to complain of things inherent in our political state. And it is criminal in a court to avoid any responsibility which the laws impose. With whatever reluctance, therefore, it is done, the court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina.

The indictment charges a battery on Lydia, a slave of Elizabeth Jones. Upon the face of the indictment, the case is the same as *The State v. Hall*, 2 Hawks, 582.

No fault is found with the rule there adopted; nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here the slave had been

of a battery upon def't's own slave.

Further, the law of slavery is not analogous to the law of other domestic relations. A slave, being property, is subject

There had been a bailment of the slave to the def't. who had inflicted a cruel and unwarrantable punishment upon her. Def't. was found guilty. He appealed, that the bailer being forth time being the owner, the indictment charging a battery upon the slave of one E. J. is not supported by proof

hired by the defendant, and was in his possession; and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment. The inquiry here is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The judge below instructed the jury that it is. He seems to have put it on the ground, that the defendant had but a special property. Our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority. The object is the same—the services of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in relation to both rights and duties, is for the time being, the owner. This opinion would, perhaps, dispose of this particular case; because the indictment, which charges a battery upon the slave of Elizabeth Jones, is not supported by proof of a battery upon defendant's own slave; since different justifications may be applicable to the two cases. But upon the general question, whether the owner is answerable criminaliter, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the court entertains but little doubt.

That he is so liable, has yet never been decided; nor, as is known, been hitherto contended. There have been no prosecutions of the sort. The established habits and uniform practice of the country in this respect, is the best evidence of the portion of power deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of everybody else, and say that this, or that authority, may be safely lopped off. This has indeed been assimilated at the bar to the other domestic relations; and arguments drawn from the well-established principles, which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them,—the difference is that which exists between freedom and slavery—and a greater cannot be imagined. In the one the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterward to assume among freemen. To such an end, and with such a subject, moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Moderate force is superadded, only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The

The criminal law could not intervene.

Cobb on Slavery § 325 - master was not justified in

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§ 87-94

STATE v. MANN.

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end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true — that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness; such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition: I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

That there may be particular instances of cruelty and deliberate barbarity, where, in conscience the law might properly interfere, is most probable. The difficulty is to determine, where a court may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master: that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master, which the slave would be constantly stimulated by his own passions, or the instigation of others to give; or the consequent wrath of the master, prompting him to bloody vengeance, upon the turbulent traitor — a vengeance generally practised with impunity, by reason of its privacy. The court, therefore, disclaims the power of changing the relation, in which these parts of our people stand to each other.

We are happy to see, that there is daily less and less occasion for the interposition of the courts. The protection already afforded by several statutes, that all-powerful motive, the private interest of the

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owner, the benevolences toward each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian, who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves. The same causes are operating, and will continue to operate with increased action, until the disparity in numbers between the whites and blacks shall have rendered the latter in no degree dangerous to the former, when the police now existing may be further relaxed. This result, greatly to be desired, may be much more rationally expected from the events alluded to, and now in progress, than from any rash expositions of abstract truths, by a judiciary tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil, by means still more wicked and appalling than even that evil.

I repeat that I would gladly have avoided this ungrateful question. But being brought to it, the court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the legislature to interpose express enactments to the contrary, it will be the imperative duty of the judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground, that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquillity, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.

Per Curiam. Let the judgment below be reversed, and judgment entered for the defendant.

7 In *Prigg v. Com. of Pa.*, 16 Pet. 539 (1842), on a writ of error to the Supreme Court of Pennsylvania, the plaintiff had been indicted under a statute of that State, of 1826, for forcibly seizing and removing a negro woman to be kept as a slave. On a plea of not guilty the jury found a special verdict that the woman was held to service as a slave under the laws of Maryland and escaped into Pennsylvania in 1832; that Prigg as the owner's agent, in 1837, caused the woman to be arrested as a fugitive from labor, under a warrant by a Pennsylvania magistrate and to be brought before the same magistrate, who refused to take further cognizance of the case, whereupon Prigg removed her and her children and gave them up to her owner in Maryland. Prigg was found guilty, and the judgment, on error, was sustained by the Supreme Court of the State. In reversing the judgment, the Supreme Court of the United States (Story, J.) said: "There are two clauses in the Constitution upon the subject of fugitives, which stand in juxtaposition with each other, and have been thought mutually to illustrate each other. They are both contained in the 2d section of the 4th article, and are in the following

Slave
escaped
from Md.
to Pa.
Prigg, as
agent of the
owner, caused
the woman
to be arrested
as a fugitive
from labor
and brought before a magistrate who refused to take cognizance
of the case. Prigg then removed her to her owner in Maryland.
He was indicted under a Pennsylvania statute and

a fugitive slave the right to follow and capture it in another state { of refuge. }

words: 'A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.' >

"No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due."

Art IV. Sect 2 - Clause 3.

"The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding States; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

"By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Somerset's Case*, Lofft's Rep. 1; s. c. 11 State Trials by Harg. 340; s. c. 20 Howell's State Trials, 79; which was decided before the American Revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different States. The clause was, therefore, of the last importance to the safety and security of the Southern States, and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity. . . .

"We have said that the clause contains a positive and unqualified principle of common law

All fugitive slave laws repealed in June 1864

* The question here was the right of a slave owner to capture his property in another slave.

Webster held once that an owner could not go into a state to get his property when such property was a slave.

Ground of this case is that const. says a fugitive slave can be captured. Art. 4 - Sect The right does not rest upon any principle

recognition of the right of the owner in the slave, unaffected by any State law or regulation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any, which is not expressed, and cannot be fairly implied. Especially are we estopped from so doing, when the clause puts the right to the service or labor upon the same ground and to the same extent in every other State as in the State from which the slave escaped, and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also. The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmation of the principles of the common law applicable to this very subject. BLACKSTONE, J., 3 Bl. Com. 4, lays it down as unquestionable doctrine. 'Recaption or reprisal' (says he) 'is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.' Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace or any illegal violence. In this sense, and to this extent this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, State or national.

"But the clause of the Constitution does not stop here. . . . It says: 'But he (the slave) shall be delivered up on claim of the party to whom such service or labor may be due.' Now, we think it exceedingly difficult, if not impracticable, to read this language and not to feel that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself. A claim is to be made. What is a claim? It is, in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. . . .

"It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case 'arising under the Constitution' of the United States; within the express delegation of judicial power given by that instrument. Congress, then, may call that power into activity for the very purpose of giving effect to that

and allowed it only under due process of law.

right; and if so, then it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guarantee to the right.

“Congress has taken this very view of the power and duty of the national government. As early as the year 1791, the attention of Congress was drawn to it (as we shall hereafter more fully see), in consequence of some practical difficulties arising under the other clause respecting fugitives from justice escaping into other States. The result of their deliberations was the passage of the Act of the 12th of February, 1793, c. 51 (7).” [This Act provided for the arrest of fugitives from service, for carrying them before a judge or magistrate, and, upon proof to his satisfaction of the master's right under the laws of the State or Territory from which the fugitive came, for the issuing of a certificate which should warrant the removal of the fugitive. The court go on to hold this Act valid, to declare the power of Congress over the subject to be exclusive, and the statute of Pennsylvania unconstitutional.]¹

¹ “I have always thought that the Constitution addressed itself to the legislatures of the States or to the States themselves. It says that those persons escaping to other States ‘shall be delivered up,’ and I confess I have always been of the opinion that it was an injunction upon the States themselves.

“When it is said that a person escaping into another State, and coming within the jurisdiction of that State, shall be delivered up, it seems to me the import of the clause is, that the State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now. But when the subject, some years ago, was before the Supreme Court of the United States, the majority of the judges held that the power to cause fugitives from service to be delivered up was a power to be exercised under the authority of this government. I do not know, on the whole, that it may not have been a fortunate decision. My habit is to respect the result of judicial deliberations and the solemnity of judicial decisions. As it now stands, the business of seeing that these fugitives are delivered up resides in the power of Congress and the national judicature, and my friend at the head of the Judiciary Committee has a bill on the subject now before the Senate, which, with some amendments to it, I propose to support, with all its provisions, to the fullest extent.” — DANIEL WEBSTER, *Speech of the 7th of March, 1850, Works*, vi. 354.

In *Ableman v. Booth*, 21 How. 506, 526 (1859), the case grew out of resistance to the second Federal law for the rendition of fugitive slaves, — that of September 18, 1850, to which Mr. Webster alluded in the passage above quoted. Near the end of the opinion, TANEY, C. J., for the court, said: “Although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the Act of Congress commonly called the Fugitive Slave Law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law.”

See *Groves v. Slaughter*, 15 Pet. 449 (1841); *Strader et al v. Graham*, 10 How. 82 (1850); *Kentucky v. Dennison*, 24 How. 66 (1860). — ED.

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DRED SCOTT v. SANDFORD.

SUPREME COURT OF THE UNITED STATES. 1857.

[19 How. 393.]

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[ERROR to the Circuit Court of the United States for the District of Missouri. The facts are stated in the opinion printed below. All the judges gave opinions; that of Mr. Justice Nelson is here presented, because a selection must be made, and because this opinion alone limits itself to grounds agreed upon by a majority of the court and necessary to the disposition of the case.]¹

NELSON, J. I shall proceed to state the grounds upon which I have arrived at the conclusion, that the judgment of the court below should be affirmed. The suit was brought in the court below by the plaintiff, for the purpose of asserting his freedom, and that of Harriet, his wife, and two children.

The defendant plead, in abatement to the suit, that the cause of action, if any, accrued to the plaintiff out of the jurisdiction of the court, and exclusively within the jurisdiction of the courts of the State of Missouri; for, that the said plaintiff is not a citizen of the State of Missouri, as alleged in the declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the demurrer, holding that the plea was insufficient in law to abate the suit.

The defendant then plead over in bar of the action:

1. The general issue. 2. That the plaintiff was a negro slave, the lawful property of the defendant. And 3. That Harriet, the wife of said plaintiff, and the two children, were the lawful slaves of the said defendant. Issue was taken upon these pleas, and the cause went down to trial before the court and jury, and an agreed state of facts was presented, upon which the trial proceeded, and resulted in a verdict for the defendant, under the instructions of the court.

The facts agreed upon were substantially as follows:

That in the year 1834, the plaintiff, Scott, was a negro slave of Dr. Emerson, who was a surgeon in the army of the United States; and in that year he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At this date, Dr. Emerson removed, with the plaintiff, from the Rock Island post to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory of Upper Louisiana, and north of the

¹ It was originally prepared, by direction of the majority, to stand as the opinion of the court. See note, p. 494, *infra*; also Tyler's "Life of Taney," 384. — Ed.

the pelf. Scott was the negro slave of a U.S. army surgeon in Mo. He followed his master to Ills. His master then took him to an army post in the

at this Fort Snelling 7 Scott married a slave of the same master by the latter's consent. The master removed the self, his wife and children to the state

CHAP. IV.]

SCOTT v. SANDFORD.

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latitude thirty-six degrees thirty minutes, and north of the State of Missouri. That he held the plaintiff in slavery, at Fort Snelling, from the last-mentioned date until the year 1838.

That in the year 1835, Harriet, mentioned in the declaration, was a negro slave of Major Taliaferro, who belonged to the army of the United States; and in that year he took her to Fort Snelling, already mentioned, and kept her there as a slave until the year 1836, and then sold and delivered her to Dr. Emerson, who held her in slavery, at Fort Snelling, until the year 1838. That in the year 1836, the plaintiff and Harriet were married, at Fort Snelling, with the consent of their master. The two children, Eliza and Lizzie, are the fruit of this marriage. The first is about fourteen years of age, and was born on board the steamboat "Gipsey," north of the State of Missouri, and upon the Mississippi River; the other, about seven years of age, was born in the State of Missouri, at the military post called Jefferson Barracks.

In 1838, Dr. Emerson removed the plaintiff, Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided. And that, before the commencement of this suit, they were sold by the doctor to Sandford, the defendant, who has claimed and held them as slaves ever since.

The agreed case also states that the plaintiff brought a suit for his freedom, in the Circuit Court of the State of Missouri, on which a judgment was rendered in his favor; but that, on a writ of error from the Supreme Court of the State, the judgment of the court below was reversed, and the cause remanded to the circuit for a new trial.

On closing the testimony in the court below, the counsel for the plaintiff prayed the court to instruct the jury, upon the agreed state of facts, that they ought to find for the plaintiff; when the court refused, and instructed them that, upon the facts, the law was with the defendant.

With respect to the plea in abatement, which went to the citizenship of the plaintiff, and his competency to bring a suit in the Federal courts, the common-law rule of pleading is, that upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment, and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights of the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the Federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is, whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of

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must be deemed a slave by the courts of the U. S. and therefore not entitled to sue in one of those courts as a citizen of that state.

Illinois, with a view to a temporary residence, and after such residence and return to the slave State, such residence in the free State works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect; but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is, that the laws of Illinois, forbidding slavery within her territory, had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman; and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and of consequence he could not be there held as a slave.

This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each State to decide for itself, either by its legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri—a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign, not merely as respects the Federal government—except as they have consented to its limitation—but sovereign as respects each other. Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois within her territories on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her.

Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state, of all persons therein; and, also, the remedy and modes of administering justice. And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not

the case does not decide that free negroes descend from slaves can not be citizens.

The majority decided what Nelson gives in his

act of Congress in the territory was unconstitutional because that was not properly up for

residing within it. No State, therefore, can enact laws to operate beyond its own dominions, and, if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties.

Now, it follows from these principles, that whatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent.

Judge Story observes, in his Conflict of Laws (p. 24), "that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories." "And that when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its customary unwritten or common law speaks directly on the subject, it is equally to be obeyed."

Nations, from convenience and comity, and from mutual interest, and a sort of moral necessity to do justice, recognize and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself; and is never bound, even upon the ground of comity, to recognize them, if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes (398), "that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible when they are contrary to its known interests." And he adds, "in the silence of any positive rule affirming or denying or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests." See also 2 Kent Com., p. 457; 13 Peters, 519, 589.

These principles fully establish, that it belongs to the sovereign State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution; and, further, that the laws of other States of the Confederacy, whether enacted by their legislatures or expounded by their courts, can have no operation within her territory, or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extra-territorial operation within the jurisdiction of another, except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of

decision
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the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires, and gives place to the foreign law.

In view of these principles, let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extra-territorially; and the State of Illinois refused to recognize its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws, and contrary to her policy. But, how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognize and enforce the law of Illinois? For, unless she is, the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extra-territorially, except what may be voluntarily conceded to them.

It has been supposed, by the counsel for the plaintiff, that a rule laid down by Huberus had some bearing upon this question. Huberus observes that "personal qualities, impressed by the laws of any place, surround and accompany the person wherever he goes, with this effect: that in every place he enjoys and is subject to the same law which other persons of his class elsewhere enjoy or are subject to." *De Confl. Leg.*, lib. 1, tit. 3, sec. 12; 4 Dallas, 375 n.; 1 Story *Con. Laws*, pp. 59, 60.

The application sought to be given to the rule was this: that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri he carried with him the personal qualities of freedom, and that the same effect must be given to his status there as in the former State. But the difficulty in the case is in the total misapplication of the rule.

These personal qualities, to which Huberus refers, are those impressed upon the individual by the law of the domicile; it is this that the author claims should be permitted to accompany the person into whatever country he might go, and should supersede the law of the place where he had taken up a temporary residence.

Now, as the domicile of Scott was in the State of Missouri, where he was a slave, and from whence he was taken by his master into Illinois for a temporary residence, according to the doctrine of Huberus, the law of his domicile would have accompanied him, and during his residence there he would remain in the same condition as in the State of Missouri. In order to have given effect to the rule, as claimed in the

argument, it should have been first shown that a domicile had been acquired in the free State, which cannot be pretended upon the agreed facts in the case. But the true answer to the doctrine of Huberus is, that the rule, in any aspect in which it may be viewed, has no bearing upon either side of the question before us, even if conceded to the extent laid down by the author; for he admits that foreign governments give effect to these laws of the domicile no further than they are consistent with their own laws, and not prejudicial to their own subjects; in other words, their force and effect depend upon the law of comity of the foreign government. We should add, also, that this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law. Story Con., secs. 91, 96, 103, 104; 2 Kent Com., p. 457, 458; 1 Burge Con. Laws, pp. 12, 127.

We come now to the decision of this court in the case of *Strader et al. v. Graham*, 10 How. p. 2. The case came up from the Court of Appeals, in the State of Kentucky. The question in the case was, whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily at several places in the State of Ohio, with their master's consent, and had returned to Kentucky into his service, had thereby become entitled to their freedom. The Court of Appeals held that they had not. The case was brought to this court under the twenty-fifth section of the Judiciary Act. This court held that it had no jurisdiction, for the reason, the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that "every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes, that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine, for herself, whether their employment in another State should or should not make them free on their return."

It has been supposed, in the argument on the part of the plaintiff, that the eighth section of the Act of Congress passed March 6, 1820 (3 St. at Large, p. 544), which prohibited slavery north of thirty-six degrees thirty minutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extra-territorially, and within the State of Missouri, beyond that of the laws of Illinois, or those of Ohio in the case of *Strader et al. v. Graham*. A similar ground was taken and urged upon the court in the case just mentioned, under the ordinance of 1787, which was enacted

during the time of the Confederation, and re-enacted by Congress after the adoption of the Constitution, with some amendments adapting it to the new government. 1 St. at Large, p. 50.

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed: "The argument assumes that the six articles which that ordinance declares to be perpetual, are still in force in the States since formed within the Territory, and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular Territory, could have no force beyond its limits. It certainly could not restrict the power of the States, within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them.

"The ordinance in question," he observes, "if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State."

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extra-territorial effect of a State law and the Act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States; and that, if this Act had attempted any such legislation, it would have been a nullity. And yet the argument here, if there be any force in it, leads to the result, that effect may be given to such legislation; for it is only by giving the Act of Congress operation within the State of Missouri, that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain, upon any consistent reasoning, that it can be made to operate indirectly upon the subject.

The argument, we think, in any aspect in which it may be viewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State; and is also subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one government have no force within the limits of another, or extra-territorially, except from the consent of the latter.

It is perhaps not unfit to notice, in this connection, that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the Act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for, not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign State — an effect, as insisted, that displaces the laws of the State, and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Con-

gress possesses the power, under the Constitution, to abolish slavery in a Territory, it must necessarily possess the like power to establish it. It cannot be a one-sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject; and then, upon the process of reasoning which seeks to extend its influence beyond the Territory, and within the limits of a State, if Congress should establish, instead of abolish, slavery, we do not see but that, if a slave should be removed from the Territory into a free State, his status would accompany him, and continue, notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the Act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided, if the construction against which we are contending should prevail. We are satisfied, however, it is unsound, and that the true answer to it is, that even conceding, for the purposes of the argument, that this provision of the Act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits, or within the jurisdiction of a State. It can neither displace its laws, nor change the status or condition of its inhabitants.

Our conclusion, therefore, is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it.

The remaining question for consideration is, What is the law of the State of Missouri on this subject? And it would be a sufficient answer to refer to the judgment of the highest court of the State in the very case, were it not due to that tribunal to state somewhat at large the course of decision and the principles involved, on account of some diversity of opinion in the cases. As we have already stated, this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff. The case was carried up to the Supreme Court for revision. That court reversed the judgment below, and remanded the cause to the circuit, for a new trial. In that state of the proceeding, a new suit was brought by the plaintiff in the Circuit Court of the United States, and tried upon the issues and agreed case before us, and a verdict and judgment for the defendant, that court following the decision of the Supreme Court of the State. The judgment of the Supreme Court is reported in the 15 Misso. R., p. 576. The court placed the decision upon the temporary residence of the master with the slaves in the State and Territory to which they removed, and their return to the slave State; and upon the principles of international law, that foreign laws have no extra-territorial force, except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations.

This is the substance of the grounds of the decision.

The same question has been twice before that court since, and the

same judgment given. 15 Misso. R. 595; 17 Ib. 434. It must be admitted, therefore, as the settled law of the State, and according to the decision in the case of *Strader et al. v. Graham*, is conclusive of the case in this court.

It is said, however, that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision, at the time this case was tried in the court below, was not to be considered the law of the State. Certainly, it must be, unless the first decision of a principle of law by a State court is to be permanent and irrevocable. The idea seems to be, that the courts of a State are not to change their opinions, or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so, in the case before us, it is an exception to the rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each one of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence—in other words, to make that his or her domicile. And in several of the cases, this removal and permanent residence were relied on, as the ground of the decision in favor of the plaintiff. All these cases, therefore, are not necessarily in conflict with the decision in the case before us, but consistent with it. In one of the two excepted cases, the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free—in Kentucky, 2 Marsh. 476; 5 B. Munroe, 176; 9 Ib. 565; in Virginia, 1 Rand. 15; 1 Leigh, 172; 10 Grattan, 495; in Maryland, 4 Harris and McHenry, 295, 322, 325. In conformity, also, with the law of England on this subject, *Ex parte Grace*, 2 Hagg. Adm. R. 94, and with the opinions of the most eminent jurists of the country. Story's Conf. 396 a; 2 Kent Com. 258 n.; 18 Pick. 193, Chief Justice Shaw. See Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552. 558.

Lord Stowell, in communicating his opinion in the case of the slave

Grace to Judge Story, states, in his letter, what the question was before him, namely: "Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return." He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the case of *Somerset*; but the practice, he observed, "has regularly been, that on his return to his own country, the slave resumed his original character of slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes: "I have read with great attention your judgment in the slave case, &c. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result." Again he observes: "In my native State (Massachusetts), the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be reintegrated."

We may remark, in this connection, that the case before the Maryland court, already referred to, and which was decided in 1799, presented the same question as that before Lord Stowell, and received a similar decision. This was nearly thirty years before the decision in that case, which was in 1828. The Court of Appeals observed, in deciding the Maryland case, that "however the laws of Great Britain in such instances, operating upon such persons there, might interfere so as to prevent the exercise of certain acts by the masters, not permitted, as in the case of *Somerset*, yet, upon the bringing Ann Joice into this State (then the province of Maryland), the relation of master and slave continued in its extent, as authorized by the laws of this State." And Luther Martin, one of the counsel in that case, stated, on the argument, that the question had been previously decided the same way in the case of slaves returning from a residence in Pennsylvania, where they had become free under her laws.

The State of Louisiana, whose courts had gone further in holding the slave free on his return from a residence in a free State than the courts of her sister States, has settled the law, by an Act of her Legislature, in conformity with the law of the court of Missouri in the case before us. Sess. Law, 1846.

The case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of the slave Grace than exists in the cases that have arisen in this country, for in that case the slave returned to a colony of England, over which the imperial government exercised supreme authority. Yet, on the return of the slave to the colony, from a temporary residence in England, he held that the

original condition of the slave attached. The question presented in cases arising here is as to the effect and operation to be given to the laws of a foreign State, on the return of the slave within an independent sovereignty.

Upon the whole, it must be admitted that the current of authority, both in England and in this country, is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts as set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. The same is also true as it respects Major Taliaferro. In such a case, the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. The case of the *Attorney-General v. Napier*, 6 Welsh, Hurst. and Gordon Exch. Rep. 217, illustrates and applies the principle in the case of an officer of the English army.

A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.

Our conclusion is, that the judgment of the court below should be affirmed.

[What is reported as the "Opinion of the Court," in this case was in fact only the Opinion of the Chief Justice announcing the Judgment of the Court.¹ It proceeds upon the following grounds: 1. The plea in abatement is before the court and raises the question whether a negro whose ancestors were brought to this country and sold as slaves "can become a member of the political community formed and brought into existence by the Constitution of the United States and so entitled to sue in a court of the United States, as being a citizen of one of the States." Such persons, although free, cannot become citizens, within the meaning of the Federal Constitution, by the action of any State, or even through naturalization by Congress — Dred Scott was not a citizen. The Circuit Court had therefore no jurisdiction, and the judgment on the plea in abatement was erroneous. 2. The record discloses also that Scott

¹ See *infra*, pp. 491 n. and 493 n. — Ed.

is not merely a free negro of the kind above named, but a slave, (a) *Mo. com promise act is unconstitutional*
 Because the eighth section of the Act for the admission of Missouri as a State, March 6, 1820 (3 Stat. at Large, 545), purporting the prohibition of slavery in a Territory of the United States was unconstitutional and did not make Scott or the members of his family free at Fort Snelling. (b) Nor is he free by reason of living in Illinois, because upon his return to Missouri his status there was fixed, by the law of Missouri, as being that of a slave. "Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction."

WAYNE, J. (p. 454), in a brief statement agreed entirely in this opinion.

DANIEL, J., also supported all its positions. But after disposing of the plea in abatement he made the following observations — "According to the view taken of the law, as applicable to the demurrer to the plea in abatement in this cause, the questions subsequently raised upon the several pleas in bar might be passed by, as requiring neither a particular examination, nor an adjudication directly upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest."

GRIER, J. (p. 469), briefly concurred with NELSON, J., "on the questions discussed by him." He also concurred with the opinion delivered by the Chief Justice, "that the Act of Congress of 6th of March, 1820, is unconstitutional and void." The form of the judgment he regarded as of little importance "as the decision of the pleas in bar shows that the plaintiff is a slave;" and so "whether the judgment be affirmed, or dismissed for want of jurisdiction, it is justified by the decision of the court and is the same in effect between the parties to the suit." He said nothing of the plea in abatement.

CAMPBELL, J. (p. 493), concurred "in the judgment pronounced by the Chief Justice." He passed over the plea in abatement, expressly declining to consider it,¹ and held that neither the law of Illinois nor

¹ See his own statement in 20 Wall. p. xi., that "the plea in abatement and the questions arising upon it, in the opinion of a majority of the court, were not before the court. The case as reported in 19 Howard discloses that each member of this majority held to this opinion, and that neither of them in their separate or concurring opinions examined the merits of the plea or passed an opinion on it." The names of this majority he gives as McLEAN, CATRON, NELSON, GRIER, and CAMPBELL. At the first argument NELSON, J., had doubted on this point, but had then voted with the other party. — ED.

that of the Territory of Minnesota affected the status of the parties after their return to Missouri. The law of that State made them slaves. 2. That the Missouri Compromise Act was unconstitutional. He concluded by saying that "the judgment should be affirmed on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded, that the suit may be dismissed."

CATRON, J. (p. 518), held that the plea in abatement was not open. As regarded the residence in Illinois, he agreed with the opinion of Mr. Justice Nelson, — "with which I not only concur but think his opinion is the most conclusive argument on the subject within my knowledge." As regarded the residence at Fort Snelling he declared that the Act of Congress was unconstitutional. He said nothing as to the form of the judgment; and closed his opinion thus: "For the reasons above stated I concur with my brother judges that the plaintiff Scott is a slave and was so when this suit was brought."

Of these seven judges composing the majority who agreed, in substance, as to the disposition of the case, only three passed upon the plea in abatement, and so upon the status of free negroes. Six agreed in declaring the Missouri Compromise Act unconstitutional. But all, without exception, also agreed in the doctrine of Mr. Justice Nelson's opinion, which, as the majority had formerly all agreed, and none afterwards denied, was enough to dispose of the case without raising any question on that Act.

McLEAN, J., and CURTIS, J., dissented.

The former (p. 529) held, 1. That the plea in abatement was not open. 2. That slavery existed only by local law, and that Scott and his family were freed by being taken into the free State of Illinois, and also into the Territory of Minnesota, where by a law of Congress (the Act of 1820 above named) slavery was prohibited. 3. That there was nothing on the record to show a voluntary return of Scott and his family to Missouri. 4. That it was not the settled law of Missouri that the slave status revived on returning there, but the contrary. 5. That the court below erred in refusing to take notice of the Act of Congress or the Constitution of Illinois.

CURTIS, J., began by saying "I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case." He held, 1. That the plea in abatement was now open, but that below it was rightly held insufficient, since negroes the descendants of ancestors brought here and sold as slaves may well be citizens of the States and of the United States. 2. That inasmuch as the law of the Territory where Scott and his wife had been married, had a special and decisive application to the case, it was necessary to consider the effect of that law. 3. That the Act of Congress prohibiting slavery there was valid and operated to give freedom to Scott and his family. 4. That the consent of the master to the marriage was an act of emancipation. 5. That the law of Missouri did not in fact, and could not in law, restore the status of slavery.

Mr. Justice Curtis did not consider specifically the effect of the residence in Illinois; on his view, it was not necessary. "I have touched," he said, "no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less would have been inconsistent with my views of my duty."]¹

¹ The great historical importance of this case will justify the quotation of the following passages relating to the manner in which the result was arrived at. Tyler's "Life of Chief Justice Taney" (pp. 382-385), preserves a letter from Hon. John A. Campbell, formerly Mr. Justice Campbell, of Nov. 24, 1870, and another confirming it, from Mr. Justice Nelson, of May 13, 1871. The former letter says: "The case of Dred Scott was argued for the first time in the spring of 1856. There were several discussions at the conferences of the judges upon the case. There was much division of opinion among them, and especially upon the first question presented. . . . The minority of the court, at that time, were of opinion that this plea was not open for examination, nor the judgment on it for review, because a demurrer had been filed to it and sustained. . . . This minority was composed of JUSTICES McLEAN, CATRON, GRIER, and CAMPBELL. The majority were CHIEF JUSTICE TANEY, JUSTICES WAYNE, NELSON, DANIEL, and CURTIS. Justice Nelson hesitated and proposed a reargument of that and other questions to be had at the next term, and this was assented to, none objecting. At the next term these questions were again argued [in December, 1856]. Upon the reargument Justice Nelson's opinion concurred with that of the minority above mentioned, and they, by this addition, became the majority. Each of these judges has recorded in his opinion that there was nothing in the plea in abatement before the court for review." In his address as chairman of a meeting of the Bar of the Supreme Court of the United States, September 15, 1874, on occasion of the death of Hon. B. R. Curtis, formerly Mr. Justice Curtis, Mr. Campbell repeated the foregoing statements, and in allusion to the irregular nature of the opinion of the Chief Justice and to Mr. Justice Curtis's comments upon it, he added (20 Wall. xi.), "It was agreed at a day in the term that the questions should be considered, and each justice might deal with them as his judgment dictated. The abstinence of a portion of the court, on the one side, and the discussion by the others, was regulated by their own opinion as before expressed. And the facts being understood, no censure was deserved by any. My belief is that Justice Curtis misconceived the facts and supposed a portion of the court had concurred in deciding a case which they had before determined was not before the court. I make this statement in justice to him as well as to my other brethren."

This remark indicates the true character of the opinion given by the Chief Justice. It was his own and not that of the court. In substance the situation is identical with that in *Barnes v. The Railroads*, 17 Wall. 294, in which the Reporter accurately states (p. 299) in introducing the opinions, that "Mr. Justice Clifford now, March 3, 1873, delivered the judgment of the court;" and, in his headnote, that it was "held (by a court nearly equally divided, and the majority who agreed in the judgment not agreeing in the grounds of it) that," &c. In that case, also, the opinion of the individual justice who delivered the judgment of the court was erroneously assumed, even by the counsel in the case, to be the opinion of the court itself; although this opinion had not, as in the *Dred Scott Case*, been so called by any of the judges of the court. See the Reporter's "note" and footnote in 17 Wallace, 335. In substance also it was the same situation as in the *License Cases* (5 How. 504), where, ten years before, the judges agreed in the judgment, but "no opinion of the court was pronounced. Each justice gave his own reasons for affirming the decisions of the State courts" (16 Curtis's Decisions, 514). How imperfectly an opinion, which is allowed to be called that of the court, may represent the

majority of the tribunal in anything but the final judgment which it renders, is further illustrated by Mr. Justice Wayne's narrative, given in the *Passenger Cases*, 7 How. 429-436, as to the "Opinion of the court," in *New York v. Miln*, 11 Pet. 102. "Thus there were left," he says, "of the seven judges but two, the Chief Justice and Mr. Justice Barbour, in favor of the opinion as a whole." Compare, also, the "opinion of the court" in *Boyd v. Nebraska*, 143 U. S. 135, with the Reporter's headnote showing the actual difference among the judges.

In the "Memoir of B. R. Curtis," written by his brother, George T. Curtis, one of the counsel for Scott (vol. i. 201, *et seq.*), it is said: "The CHIEF JUSTICE and JUSTICES WAYNE, CATRON, DANIEL, and CAMPBELL were from slaveholding States; JUSTICES McLEAN, NELSON, GRIER, and CURTIS were from non-slaveholding States. The case of Dred Scott was first argued at the December term, 1855. After consideration and comparison of views, it was determined by a majority of the judges that it was not necessary to decide the question of Scott's citizenship under the plea to the jurisdiction, but that the case should be disposed of by an examination of the merits; that is to say, by deciding whether he was a freeman or a slave, upon the facts agreed upon by the parties under the plea in bar of the action. One of the questions thus arising was, as the reader has seen, whether a temporary residence of a slave in the State of Illinois worked an emancipation, notwithstanding his return to Missouri. If it did not, it might be unnecessary to act upon the question of the power of Congress to prohibit slavery in the territory of the United States, into which Scott had been taken from Illinois, unless there were circumstances in his residence in the Federal territory which ought to lead to a different conclusion. It was assigned to Judge Nelson to write the opinion of the court upon this view of the case; in which view, however, Judge McLean and Judge Curtis did not concur. Judge Nelson wrote an opinion, which, from its internal evidence, was manifestly designed to stand and be delivered as the opinion of a majority of the bench. . . . The conclusion reached by this opinion was, not, as was afterwards directed, that the case should be dismissed for want of jurisdiction, but that the judgment of the Circuit Court, which had held Scott to be still a slave, should be affirmed."

"The astuteness with which this opinion avoided a decision of the question arising out of the residence of Scott in a Territory of the United States where slavery was prohibited by an Act of Congress, and the remarkable subtlety of the reasoning that this, too, was a matter for the State court to decide, because the law of the Territory could have no extra-territorial force except such as the State of Missouri might extend to it under the comity of nations, — show very distinctly that, after the first argument of the case in the Supreme Court, it was not deemed, by a majority of the bench, to be either necessary or prudent to express any opinion upon the constitutional power of Congress to prohibit slavery in the Territories of the United States. . . .

"At some time after the first argument of the case, but during the same term, and after Judge Nelson's opinion had been written, a motion was made in a conference of the court for a re-argument of the case at the next term. This motion prevailed, and Judge Nelson's opinion was consequently set aside. Two questions were then carefully framed by the Chief Justice, to be argued *de novo* at the bar, in the following terms: —

"1. Whether, after the plaintiff had demurred to the defendant's first plea to the jurisdiction of the court below, and the court had given judgment on that demurrer in favor of the plaintiff, and had ordered the defendant to answer over, and the defendant had submitted to that judgment and pleaded over to the merits, the appellate court can take notice of the facts admitted on the record by the demurrer, which were pleaded in bar of the jurisdiction of the court below, so as to decide whether that court had jurisdiction to hear and determine the cause?

"2. Whether or not, assuming that the appellate court is bound to take notice of the facts appearing upon the record, the plaintiff is a citizen of the State of Missouri, within the meaning of the eleventh section of the Judiciary Act of 1789? . . .

"After this second argument, and at some time during the same term, Mr. Justice Wayne became convinced that it was practicable for the Supreme Court of the United

States to quiet all agitation on the question of slavery in the Territories, by affirming that Congress had no constitutional power to prohibit its introduction. With the best intentions, with entirely patriotic motives, and believing thoroughly that such was the law on this constitutional question, he regarded it as eminently expedient that it should be so determined by the court. In the short observations which he read in the court, referring to the constitutional questions involved, he said that ‘the peace and harmony of the country required the settlement of them by judicial decision;’ and it is well known, from his frank avowals in conversation at the time, that he regarded it as a matter of great good fortune to his own section of the country, that he had succeeded in producing a determination, on the part of a sufficient number of his brethren, to act upon the constitutional question which had so divided the people of the United States. He persuaded the Chief Justice, Judge Grier, and Judge Catron of the public expediency of this course; and being perfectly convinced, as he somehow had convinced himself, that the appellate court could hold that the Circuit Court had no jurisdiction of the case, because a free negro could not be a ‘citizen,’ and yet could go on and decide all questions arising upon the merits, he could conscientiously concur, as he did, in every part of the opinion which the Chief Justice, after the second argument, felt called upon to write, and which was denominated the opinion of the court, although no other judge, excepting Mr. Justice Wayne, concurred in all its points, reasonings, and conclusions.”

The same writer, in speaking of the dissenting opinion of Judge Curtis (*Ib.* 231), says: “In my judgment, its permanent importance consists in the demonstration which it made of this proposition: That the Supreme Court of the United States, sitting as an appellate tribunal to correct the errors of a Circuit Court, cannot, under a plea to the jurisdiction, decide that the lower court had no jurisdiction to hear and determine the cause, and then proceed to decide a question of constitutional law which arises only on a plea in bar to the merits of the action. The following impressive close of Judge Curtis’s discussion of this part of the subject comprehends the whole substance of his objection to the course of a majority of his brethren: ‘I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff’s citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court, or any court, binding, when expressed on a question not legitimately before it. The judgment of this court is, that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.’

“To those who do not fully appreciate the judicial functions of the Supreme Court of the United States, or who do not fully understand the limits within which it should carefully act, this may seem to have been hypercritical in its technicality. But to the instructed and enlightened student of our national jurisprudence, who contemplates the true function of the Supreme Court as the judicial arbiter of constitutional questions, these apparent technicalities will be recognized as pregnant with most important substance; for it cannot be doubted that the temptation to be drawn into the expression of opinions on constitutional questions, because they are entering into the politics of the time, is one against which that court should be hedged by the strict and logical order of judicial action, which can alone produce a judicial, and therefore a binding, determination.”

In a very careful and valuable discussion of this case (“A Legal Review of the Case of Dred Scott,” Boston, Crosby, Nichols & Co., 1857, reprinted, with some alterations, from the [Boston] “Law Reporter” for June, 1857), by Messrs. John Lowell and Horace Gray, better known afterwards as Judge Lowell, of the United States Circuit Court for Massachusetts, and Mr. Justice Gray, of the Supreme Court of the United States, it is said (p. 25): “The court, as we have shown, undoubtedly did decide that the

plaintiff was a slave when this suit was brought; and in order to arrive at this conclusion, they must have held, either that he never became entitled to his freedom, or that, having acquired such a right, he lost it by his return to Missouri. But in order to determine the case upon the first ground, it must have been held, not only that the plaintiff did not become entitled to freedom in the Territory, but also that he could not have asserted such a right in Illinois,—a position which most of the judges do not even suggest. On the contrary, the decision, so far as the residence in Illinois is concerned, is put distinctly upon the ground that the laws of Illinois could not operate on the plaintiff after his return to Missouri. This decision disposes equally of his residence in the Territory, for his stay in each place was for an equal time, and for similar purposes. The whole case being thus disposed of, the opinion on the Missouri Compromise Act was clearly extra-judicial."

And later on (p. 51), it is added: "Measuring the point adjudged, therefore, by all the material facts of the case, it is set forth at length in our headnote, or may be briefly stated thus: A slave taken by his master into a State or Territory where slavery is prohibited by law, and afterwards returning with his master into a slave State, and acquiring a residence there, if deemed by the highest court of that State, after his return, to be a slave, must be deemed a slave by the courts of the United States, and therefore not entitled to sue in one of those courts as a citizen of that State." In this conclusion seven of the nine judges concur; and it is best stated by Mr. Justice Nelson, whose opinion is wholly devoted to the question of the plaintiff's condition in Missouri after his return, and is the ablest in reasoning, and most judicial in tone of all the opinions of the majority."

Compare Bryce, Am. Com. i. 256, 257 (1st ed.): "Occasionally it (the Supreme Court of the United States) has been required to give decisions which have worked with tremendous force on politics. The most famous of these was the Dred Scott Case, in which the Supreme Court, on an action by a negro for assault and battery against the person claiming to be his master, declared that a slave taken temporarily to a free State and to a Territory in which Congress had forbidden slavery, and afterwards returning into a slave State and resuming residence there, was not a citizen capable of suing in the Federal courts if by the law of the slave State he was still a slave. This was the point which actually called for decision; but the majority of the court—for there was a dissentient minority—went further, and delivered a variety of dicta on various other points touching the legal status of negroes and the constitutional views of slavery. This judgment, since the language used in it seemed to cut off the hope of a settlement by the authority of Congress of the then (1857) pending disputes over slavery and its extension, did much to precipitate the Civil War."

See *Hobbs v. Fogg*, 6 Watts, 553 (1837); *West Chester, &c. R. R. Co. v. Miles*, 55 Pa. St. 209 (1867); and *Cory v. Carter*, 48 Ind. 327, 338 (1874). See also, generally, Cobb on Slavery (1858), and Stroud on Slavery (1827). — Ed.

Slaves belonging to Mrs.
Lemmon were brought by

from Virginia to
New York by sea, and
landed

at the
attention

embarking on

new voyage to Texas,

slave state.

LEMMON v. THE PEOPLE.

NEW YORK COURT OF APPEALS. 1860.

[20 N. Y. 562.]

[APPEAL from a judgment of the Supreme Court (Dec. 1857), affirming an order of a justice of the Superior Court of the city of New York (Nov. 13, 1852) discharging on habeas corpus eight negroes claimed

Dred Scott case came up
in March 1857

person should introduce a slave into that state in the course of a journey to or from it, or in pass-

as the slaves of Juliet Lemmon.] Charles O'Connor,¹ for the appellants; Joseph Blunt and Wm. M. Everts, for the respondents.

DENIO, J. The petition upon which the writ of *habeas corpus* was issued, states that the colored persons sought to be discharged from imprisonment were, on the preceding night, taken from the steamer "City of Richmond," in the harbor of New York, and at the time of presenting the petition, were confined in a certain house in Carlisle Street in that city. The writ is directed to the appellant by the name of "Lemmings," as the person having in charge "eight colored persons lately taken from the steamer 'City of Richmond,' and to the man in whose house in Carlisle Street they were confined." The return is made by Lemmon, the appellant, and it speaks of the colored persons who are therein alleged to be slaves, and the property of Juliet Lemmon, as "the eight slaves or persons named in the said writ of *habeas corpus*." It alleges that they were taken out of the possession of Mrs. Lemmon, while in transitu between Norfolk, in Virginia, and the State of Texas, and that both Virginia and Texas are slaveholding States; that she had no intention of bringing the slaves into this State to remain therein, or in any manner except on their transit as aforesaid through the port of New York; that she was compelled by necessity to touch or land, but did not intend to remain longer than necessary, and that such landing was for the purpose of passage and transit and not otherwise, and that she did not intend to sell the slaves. It is also stated that she was compelled by "necessity or accident" to take passage from Norfolk in the above-mentioned steamship, and that Texas was her ultimate place of destination.

I understand the effect of these statements to be that Mrs. Lemmon, being the owner of these slaves, desired to take them from her residence in Norfolk to the State of Texas; and, as a means of effecting that purpose, she embarked, in the steamship mentioned, for New York, with a view to secure a passage from thence to her place of destination. As nothing is said of any stress of weather, and no marine casualty is mentioned, the necessity of landing, which is spoken of, refers, no doubt, to the exigency of that mode of prosecuting her journey. If the ship in which she arrived was not bound for the Gulf of Mexico, she would be under the necessity of landing at New York to re-embark in some other vessel sailing for that part of the United States; and this, I suppose, is what it was intended to state. The necessity or accident which is mentioned as having compelled her to embark at Norfolk in the "City of Richmond," is understood to refer to some circumstance which prevented her making a direct voyage from Virginia to Texas. The question to be decided is whether the bringing the slaves into this State under these circumstances entitled them to their freedom.

¹ The extraordinary argument of this distinguished lawyer is fully reported. It cannot find a place here, but it is well worth attention, — whatever may be thought of the soundness of its positions. — ED.

clause of the Const. does not enable a citizen of Va to carry into another state the legal institutions of his own state. The Act of U. S. was valid and the

The intention, and the effect, of the statutes of this State bearing upon the point are very plain and unequivocal. By an Act passed in 1817, it was declared that no person held as a slave should be imported, introduced or brought into this State on any pretence whatever, except in the cases afterwards mentioned in the Act, and any slave brought here contrary to the Act was declared to be free. Among the excepted cases was that of a person, not an inhabitant of the State, passing through it, who was allowed to bring his slaves with him; but they were not to remain in the State longer than nine months. Laws of 1817, ch. 137, §§ 9, 15. The portions of this Act which concern the present question were re-enacted at the revision of the laws in 1830. The first and last sections of the title are in the following language:—

“ § 1. No person held as a slave shall be imported, introduced or brought into this State on any pretence whatsoever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought in this State contrary to the laws in force at the time, shall be free.”

“ § 16. Every person born in this State, whether white or colored, is free. Every person who shall hereafter be born within this State shall be free; and every person brought into this State as a slave, except as authorized by this title, shall be free.” R. S., part 1, ch. 20, tit. 7.

The intermediate sections, three to seven inclusive, contain the exceptions. Section 6 is as follows: “ Any person, not being an inhabitant of this State, who shall be travelling to or from, or passing through this State, may bring with him any person lawfully held in slavery, and may take such person with him from this State; but the person so held in slavery shall not reside or continue in this State more than nine months; if such residence be continued beyond that time such person shall be free.” In the year 1841, the legislature repealed this section, together with the four containing other exceptions to the general provisions above mentioned. Ch. 247. The effect of this repeal was to render the 1st and 16th sections absolute and unqualified. If any doubt of this could be entertained upon the perusal of the part of the title left unrepealed, the rules of construction would oblige us to look at the repealed portions in order to ascertain the sense of the residue. *Bussey v. Story*, 4 Barn. & Adolph. 98. Thus examined, the meaning of the statute is as plain as though the legislature had declared in terms that if any person should introduce a slave into this State, in the course of a journey to or from it, or in passing through it, the slave shall be free.

If, therefore, the legislature had the constitutional power to enact this statute, the law of the State precisely meets the case of the persons who were brought before the judge on the writ of *habeas corpus*, and his order discharging them from constraint was unquestionably correct. Every sovereign State has a right to determine by its laws the condition of all persons who may at any time be within its jurisdiction; to

rights acquired in Virginia are not to be recognized in N. Y. The judge says this is a question for the political department to settle and not for the

Court. If N. Y. one can follow and capture him after he captures him has the owner a right to return through N. Y. to Va.? Yes, because the

exclude therefrom those whose introduction would contravene its policy, or to declare the conditions upon which they may be received, and what subordination or restraint may lawfully be allowed by one class or description of persons over another. Each State has, moreover, the right to enact such rules as it may see fit respecting the title to property, and to declare what subjects shall, within the State, possess the attributes of property, and what shall be incapable of a proprietary right. These powers may of course be variously limited or modified by its own constitutional or fundamental laws; but independently of such restraints (and none are alleged to exist affecting this case) the legislative authority of the State over these subjects is without limit or control, except so far as the State has voluntarily abridged her jurisdiction by arrangements with other States. There are, it is true, many cases where the conditions impressed upon persons and property by the laws of other friendly States may and ought to be recognized within our own jurisdiction. These are defined, in the absence of express legislation, by the general assent and by the practice and usage of civilized countries, and being considered as incorporated into the municipal law, are freely administered by the courts. They are not, however, thus allowed on account of any supposed power residing in another State to enact laws which should be binding on our tribunals, but from the presumed assent of the law-making power to abide by the usages of other civilized States. Hence it follows that where the legislature of the State, in which a right or privilege is claimed on the ground of comity, has by its laws spoken upon the subject of the alleged right, the tribunals are not at liberty to search for the rule of decision among the doctrines of international comity, but are bound to adopt the directions laid down by the political government of their own State. We have not, therefore, considered it necessary to inquire whether by the law of nations, a country where negro slavery is established has generally a right to claim of a neighboring State, in which it is not allowed, the right to have that species of property recognized and protected in the course of a lawful journey taken by the owner through the last-mentioned country, as would undoubtedly be the case with a subject recognized as property everywhere; and it is proper to say that the counsel for the appellant has not urged that principle in support of the claim of Mrs. Lemmon.

What has been said as to the right of a sovereign State to determine the status of persons within its jurisdiction applies to the States of this Union, except as it has been modified or restrained by the Constitution of the United States. *Groves v. Slaughter*, 15 Pet. 419; *Moore v. The People of Illinois*, 14 How. 13; *City of New York v. Miln*, 11 Pet. 131, 139. There are undoubtedly reasons, independently of the provisions of the Federal Constitution, for conciliatory legislation on the part of the several States, towards the polity, institutions and interests of each other, of a much more persuasive character than those which prevail even between the most friendly States unconnected by

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any political union; but these are addressed exclusively to the political power of the respective States; so that whatever opinion we might entertain as to the reasonableness, or policy, or even of the moral obligation of the non-slaveholding States to establish provisions similar to those which have been stricken out of the Revised Statutes, it is not in our power, while administering the laws of this State in one of its tribunals of justice, to act at all upon those sentiments, when we see, as we cannot fail to do, that the legislature has deliberately repudiated them.

The power which has been mentioned as residing in the States is assumed by the Constitution itself to extend to persons held as slaves by such of the States as allow the condition of slavery, and to apply also to a slave in the territory of another State, which did not allow slavery, even unaccompanied with an intention on the part of the owner to hold him in a state of slavery in such other State. The provision respecting the return of fugitives from service contains a very strong implication to that effect. It declares that no person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, &c. There was at least one State which at the adoption of the Constitution did not tolerate slavery; and in several of the other States the number of slaves was so small and the prevailing sentiment in favor of emancipation so strong, that it was morally certain that slavery would be speedily abolished. It was assumed by the authors of the Constitution, that the fact of a Federative Union would not of itself create a duty on the part of the States which should abolish slavery to respect the rights of the owners of slaves escaping thence from the States where it continued to exist. The apprehension was not that any of the States would establish rules or regulations looking primarily to the emancipation of fugitives from labor, but that the abolition of slavery in any State would draw after it the principle that a person held in slavery would immediately become free on arriving, in any manner, within the limits of such State. That principle had then recently been acted upon in England in a case of great notoriety, which could not fail to be well known to the cultivated and intelligent men who were the principal actors in framing the Federal Constitution. A Virginia gentleman of the name of Stewart had occasion to make a voyage from his home in that colony to England, on his own affairs, with the intention of returning as soon as they were transacted; and he took with him as his personal servant his negro slave, Somerset, whom he had purchased in Virginia and was entitled to hold in a state of slavery by the laws prevailing there. While they were in London, the negro absconded from the service of his master, but was re-taken and put on board a vessel lying in the Thames bound to Jamaica, where slavery also prevailed, for the purpose of being there sold as a slave. On application to Lord Mansfield, Chief Justice of the King's Bench, a writ of habeas corpus was issued to Knowles as

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The Somerset Case.

master of the vessel, whose return to the writ disclosed the foregoing facts. Lord Mansfield referred the case to the decision of the Court of King's Bench, where it was held, by the unanimous opinion of the judges, that the restraint was illegal, and the negro was discharged. *The Negro Case*, 11 Harg. S. T. 340; *Somerset v. Stewart*, Lofft, 1.¹ It was the opinion of the court that a state of slavery could not exist except by force of positive law, and it being considered that there was no law to uphold it in England, the principles of the law respecting the writ of *habeas corpus* immediately applied themselves to the case, and it became impossible to continue the imprisonment of the negro. The case was decided in 1772, and from that time it became a maxim that slaves could not exist in England. The idea was reiterated in the popular literature of the language, and fixed in the public mind by a striking metaphor which attributed to the atmosphere of the British Islands a quality which caused the shackles of the slave to fall off. The laws of England respecting personal rights were in general the laws of the colonies, and they continued the same system after the Revolution by provisions in their constitutions, adopting the common law subject to alterations by their own statutes. The literature of the colonies was that of the mother country.

The aspect in which the case of fugitive slaves was presented to the authors of the Constitution therefore was this: A number of the States had very little interest in continuing the institution of slavery, and were likely soon to abolish it within their limits. When they should do so, the principle of the laws of England as to personal rights and the remedies for illegal imprisonment, would immediately prevail in such States. The judgment in *Somerset's case* and the principles announced by Lord Mansfield, were standing admonitions that even a temporary restraint of personal liberty by virtue of a title derived under the laws of slavery, could not be sustained where that institution did not exist by positive law, and where the remedy by *habeas corpus*, which was a cherished institution of this country as well as in England, was established. Reading the provision for the rendition of fugitive slaves, in the light which these considerations afford, it is impossible not to perceive that the convention assumed the general principle to be that the escape of a slave from a State in which he was lawfully held to service into one which had abolished slavery would *ipso facto* transform him into a free man. This was recognized as the legal consequence of a slave going into a State where slavery did not exist, even though it were without the consent and against the will of the owner. *A fortiori* he would be free if the master voluntarily brought him into a free State for any purpose of his own. But the provision in the Constitution extended no further than the case of fugitives. As to such cases, the admitted general consequence of the presence of a slave in a

¹ For a striking passage from an unpublished report of this case by Tilghman, afterwards Chief Justice of Pennsylvania, then a student of law in England, see the London Times for October 20, 1883, in a letter entitled "American Law and Lawyers." — ED.

free State was not to prevail, but he was by an express provision in the Federal compact to be returned to the party to whom the service was due. Other cases were left to be governed by the general laws applicable to them. This was not unreasonable, as the owner was free to determine whether he would voluntarily permit his slave to go within a jurisdiction which did not allow him to be held in bondage. That was within his own power, but he could not always prevent his slaves from escaping out of the State in which their servile condition was recognized. The provision was precisely suited to the exigency of the case, and it went no further.

In examining other arrangements of the Constitution, apparently inserted for purposes having no reference to slavery, we ought to bear in mind that when passing the fugitive slave provision the convention was contemplating the future existence of States which should have abolished slavery, in a political union with other States where the institution would still remain in force. It would naturally be supposed that if there were other cases in which the rights of slave-owners ought to be protected in the States which should abolish slavery, they would be adjusted in connection with the provision looking specially to that case, instead of being left to be deduced by construction from clauses intended primarily for cases to which slavery had no necessary relation. It has been decided that the fugitive clause does not extend beyond the case of the actual escape of a slave from one State to another. *Ex parte Simmons*, 4 Wash. C. C. R. 396. But the provision is plainly so limited by its own language.

The Constitution declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. 4, § 2. No provision in that instrument has so strongly tended to constitute the citizens of the United States one people as this. Its influence in that direction cannot be fully estimated without a consideration of what would have been the condition of the people if it or some similar provision had not been inserted. Prior to the adoption of the Articles of Confederation, the British colonies on this continent had no political connection, except that they were severally dependencies of the British crown. Their relation to each other was the same which they respectively bore to the other English colonies, whether on this continent or in Europe or Asia. When, in consequence of the Revolution, they severally became independent and sovereign States, the citizens of each State would have been under all the disabilities of alienage in every other, but for a provision in the compacts into which they entered whereby that consequence was avoided. The articles adopted during the Revolution formed essentially a league for mutual protection against external force; but in passing them it was felt to be necessary to secure a community of intercourse which would not necessarily obtain even among closely allied States. This was effected by the fourth article of that instrument, which declared that the free inhabitants of each of the States (paupers, vagabonds, and fugitives from justice excepted)

should be entitled to all privileges and immunities of free citizens in the several States, and that the people of each State should have free ingress and egress to and from any other State, and should enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively. The Constitution organized a still more intimate union, constituting the States, for all external purposes and for certain enumerated domestic objects, a single nation; but still the principle of State sovereignty was retained as to all subjects, except such as were embraced in the delegations of power to the general government or prohibited to the States. The social status of the people, and their personal and relative rights as respects each other, the definition and arrangements of property, were among the reserved powers of the States. The provision conferring rights of citizenship upon the citizens of every State in every other State, was inserted substantially as it stood in the Articles of Confederation. The question now to be considered is, how far the State jurisdiction over the subjects just mentioned is restricted by the provision we are considering; or, to come at once to the precise point in controversy, whether it obliges the State governments to recognize, in any way, within their own jurisdiction, the property in slaves which the citizens of States in which slavery prevails may lawfully claim within their own States — beyond the case of fugitive slaves. The language is that they shall have the privileges and immunities of citizens in the several States. In my opinion the meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities — that is, the same rights — which the citizens of that State possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of the particular State would be unlawful. But the clause has nothing to do with the distinctions founded on domicil. A citizen of Virginia, having his home in that State, and never having been within the State of New York, has the same rights under our laws which a native-born citizen, domiciled elsewhere, would have, and no other rights. Either can be the proprietor of property here, but neither can claim any rights which under our laws belong only to residents of the State. But where the laws of the several States differ, a citizen of one State asserting rights in another, must claim them according to the laws of the last-mentioned State, not according to those which obtain in his own.

The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported. A very little reflection will show the fallacy of the idea. Our laws declare contracts depending upon games of chance or skill, lotteries, wagering policies of insurance, bargains for more than 7 per cent per annum of interest, and many others, void. In

other States such contracts, or some of them, may be lawful. But no one would contend that if made within this State by a citizen of another State where they would have been lawful, they would be enforced in our courts. Certain of them, if made in another State and in conformity with the laws there, would be executed by our tribunals upon the principles of comity; and the case would be the same if they were made in Europe or in any other foreign country. The clause has nothing to do with the doctrine of international comity. That doctrine, as has been remarked, depends upon the usage of civilized nations and the presumed assent of the legislative authority of the particular State in which the right is claimed; and an express denial of the right by that authority is decisive against the claim. How then, is the case of the appellant aided by the provision under consideration?

The legislature has declared, in effect, that no person shall bring a slave into this State, even in the course of a journey between two slaveholding States, and that if he does, the slave shall be free. Our own citizens are of course bound by this regulation. If the owner of these slaves is not in like manner bound it is because, in her quality of citizen of another State, she has rights superior to those of any citizen of New York, and because, in coming here, or sending her slaves here for a temporary purpose, she has brought with her, or sent with them, the laws of Virginia, and is entitled to have those laws enforced in the courts, notwithstanding the mandate of our own laws to the contrary. But the position of the appellant proves too much. The privileges and immunities secured to the citizens of each State by the Constitution are not limited by time, or by the purpose for which, in a particular case, they may be desired, but are permanent and absolute in their character. Hence, if the appellant can claim exemption from the operation of the statute on which the respondent relies, on the ground that she is a citizen of a State where slavery is allowed, and that our courts are obliged to respect the title which those laws confer, she may retain slaves here during her pleasure; and, as one of the chief attributes of property is the power to use it, and to sell or dispose of it, I do not see how she could be debarred of these rights within our jurisdiction as long as she may choose to exercise them. She could not, perhaps, sell them to a citizen of New York, who would at all events be bound by our laws, but any other citizen of a slave State — who would equally bring with him the immunities and privileges of his own State — might lawfully traffic in the slave property. But my opinion is that she has no more right to the protection of this property than one of the citizens of this State would have upon bringing them here under the same circumstances, and that the clause of the Constitution referred to has no application to the case. I concede that this clause gives to citizens of each State entire freedom of intercourse with every other State, and that any law which should attempt to deny them free ingress or egress would be void. But it is citizens only who possess these rights, and slaves certainly are not citizens. Even free negroes, as is well known,

have been alleged not to possess that quality. In *Moore v. The State of Illinois*, already referred to, the Supreme Court of the United States, in its published opinion, declared that the States retained the power to forbid the introduction into their territory of paupers, criminals or fugitive slaves. The case was a conviction under a statute of Illinois, making it penal to harbor or secrete any negro, mulatto or person of color being a slave or servant owing service or labor to any other person. The indictment was for secreting a fugitive slave who had fled from his owner in Missouri. The owner had not intervened to reclaim him so as to bring the fugitive law into operation, and the case was placed by the court on the ground that it was within the legitimate power of State legislation, in the promotion of its policy, to exclude an unacceptable population. I do not at all doubt the right to exclude a slave as I do not consider him embraced under the provision securing a common citizenship; but it does not seem to me clear that one who is truly a citizen of another State can be thus excluded, though he may be a pauper or a criminal, unless he be a fugitive from justice. The fourth article of confederation contained an exception to the provision for a common citizenship, excluding from its benefits paupers and vagabonds as well as fugitives from justice; but this exception was omitted in the corresponding provision of the Constitution. If a slave attempting to come into a State of his own accord can be excluded on the ground mentioned, namely, because as a slave he is an unacceptable inhabitant, as it is very clear he may be, it would seem to follow that he might be expelled if accompanied by his master. It might, it is true, be less mischievous to permit the residence of such a person when under the restraint of his owner; but of this the legislature must judge. But it is not the right of the slave but of the master which is supposed to be protected under the clause respecting citizenship. The answer to the claim in that aspect has been already given. It is that the owner cannot lawfully do anything which our laws do not permit to be done by one of our own citizens; and as a citizen of this State cannot bring a slave within its limits except under the condition that he shall immediately become free, the owner of these slaves could not do it without involving herself in the same consequences. . . .

Upon the whole case, I have come to the conclusion that there is nothing in the National Constitution or the laws of Congress to preclude the State judicial authorities from declaring these slaves thus introduced into the territory of this State, free, and setting them at liberty, according to the direction of the statute referred to. For the foregoing reasons, I am in favor of affirming the judgment of the Supreme Court.

[The concurring opinion of WRIGHT, J., and the dissenting opinion of CLERKE, J., are omitted. With the first two judges above named concurred DAVIES, BACON, and WELLES, JJ.; CLERKE, J., and COMSTOCK, C. J., dissenting, and SELDEN, J., doubting.]

NOTE.

See, at this point, the amendments to the Constitution of the United States, XIII.-XV. inclusive, *ante*, pp. 413, 414. Compare Pomeroy, Const. Law (Bennett's ed.), ss. 231-239, and 2 Story, Const. Law, ss. 1959-1963, an addition by Judge Cooley.

UNITED STATES *v.* RHODES.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF KENTUCKY.
1866.

[1 *Ablott*, U. S. 28.]

MOTION in arrest of judgment.

SWAYNE. J. This is a prosecution under the Act of Congress of the 9th of April, 1866, entitled "An Act to protect all Persons in the United States in their Civil Rights, and to furnish the Means for their Vindication." The defendants having been found guilty by a jury, the case is now before us upon a motion in arrest of judgment.

Three grounds are relied upon in support of the motion. It is insisted:—

I. That the indictment is fatally defective.

II. That the case which it makes, or was intended to make, is not within the Act of Congress upon which it is founded.

III. That the Act itself is unconstitutional and void.

I. As to the indictment, if either count be sufficient, it will support the judgment of the court upon the verdict. Our attention will be confined to the second count. That count alleges that the defendants, being white persons, "on the 1st of May, 1866, at the county of Nelson, in the State and District of Kentucky, at the hour of eleven of the clock in the night of the same day, feloniously and burglariously did break and enter the dwelling-house there situate of Nancy Talbot, a citizen of the United States of the African race, having been born in the United States, and not subject to any foreign power, who was then and there, and is now, denied the right to testify against the said defendants, in the courts of the State of Kentucky, and of the said county of Nelson, with intent the goods and chattels, moneys and property of the said Nancy Talbot, in the said dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the United States."

The objection urged against this count is, that it does not aver that "white citizens" enjoy the right which it is alleged is denied to Nancy Talbot. This fact is vital in the case. Without it our jurisdiction cannot be maintained. It is averred that she is a citizen of the United States, of the African race, and that she is denied the right to testify against the defendants, they being white persons. Section 669 of the

Code of Civil Practice of Kentucky gives this right to white persons under the same circumstances. This is a public statute, and we are bound to take judicial cognizance of it. It is never necessary to set forth matters of law in a criminal pleading. The indictment is, in legal effect, as if it averred the existence and provisions of the statute. The enjoyment of the right in question by white citizens is a conclusion of law from the facts stated. Averment and proof could not bring it into the case more effectually for any purpose than it is there already. 1 Chitt. Cr. Law, 188; 2 Bos. and P. 127; 2 Leach, 942; 1 Bishop Crim. Pro., §§ 52, 53.

This right is one of those secured to Nancy Talbot by the first section of this Act. The objection to this count cannot be sustained.

II. Is the offence charged, within the statute?

The first section enacts: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery, . . . shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The second section provides: "That any person, who under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this Act, or to different punishment, pains, or penalties on account of such person having at any time been held in the condition of slavery, . . . or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor," &c.

The third section declares: "That the District Courts of the United States within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this Act, and also, concurrently with the Circuit Courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State where they may be, any of the rights secured to them by the first section of this Act; and if any suit or prosecution, civil or criminal, shall be commenced in any State court against such person, for any cause whatsoever, . . . such defendant shall have the right to remove such cause for trial to the proper District or Circuit Court in the manner prescribed by the Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases, approved March 3, 1863, and all Acts amendatory thereof." . . .

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When the Act was passed there was no State where ample provision did not exist for the trial and punishment of persons of color for all offences; and no locality where there was any difficulty in enforcing the law against them. There was no complaint upon the subject. The aid of Congress was not invoked in that direction. It is not denied that the first and second sections were designed solely for their benefit. The third section, giving the jurisdiction to which this question relates, provides expressly that if sued or prosecuted in a State court under the circumstances mentioned, they may at once have the cause certified into a proper Federal court. . . .

It is incredible that all this machinery, including the agency of the freedmen's bureau, would have been provided, if the intention were to limit the criminal jurisdiction conferred by the third section to colored persons, and exclude all white persons from its operation.

The title of the Act is in harmony with this view of the subject.

The construction contended for would obviously defeat the main object which Congress had in view in passing the Act, and produce results the opposite of those intended.

The difficulty was that where a white man was sued by a colored man, or was prosecuted for a crime against a colored man, colored witnesses were excluded. This in many cases involved a denial of justice. Crimes of the deepest dye were committed by white men with impunity. Courts and juries were frequently hostile to the colored man, and administered justice, both civil and criminal, in a corresponding spirit. Congress met these evils by giving to the colored man everywhere the same right to testify "as is enjoyed by white citizens," abolishing the distinction between white and colored witnesses, and by giving to the courts of the United States jurisdiction of all causes, civil and criminal, which concern him, wherever the right to testify as if he were white is denied to him or cannot be enforced in the local tribunals of the State.

The context and the rules of interpretation to be applied permit of no other construction. Such was clearly the intention of Congress, and that intention constitutes the law.

This, with the provision which authorizes colored defendants in the State courts to have their causes certified into the Federal courts, and the other provisions referred to, renders the protection which Congress has given as effectual as it can well be made by legislation. It is one system, all the parts looking to the same end.

Where crime is committed with impunity by any class of persons, society, so far as they are concerned, is reduced to that condition of barbarism which compels those unprotected by other sanctions to rely upon physical force for the vindication of their natural rights. There is no other remedy, and no other security.

It is said there can be no such thing as a right to testify, and that if Congress conferred it by this Act, a cloud of colored witnesses may appear in every case and claim to exercise it.

There is no force in this argument. The statute is to be construed

reasonably. Like the right to sue and to contract, it is to be exercised only on proper occasions and within proper limits. Every right given is to be the same "as is enjoyed by white citizens."

It is urged that this is a penal statute, and to be construed strictly. We regard it as remedial in its character, and to be construed liberally, to carry out the wise and beneficent purposes of Congress in enacting it. Bacon's Abr. tit. Statute, 1.

But if the Act were a penal statute, the canons of interpretation to be applied would not affect the conclusion at which we have arrived. *United States v. Wiltberger*, 5 Wheat. 96; *Commonwealth v. Lowry*, 8 Pick. 374; *United States v. Morris*, 14 Pet. 475; *United States v. Winn*, 3 Sumn. 211; 1 Bish. Cr. Law, 236.

This objection to the indictment cannot avail the defendants.

III. Is the Act warranted by the Constitution?

The first eleven amendments of the Constitution were intended to limit the powers of the government which it created, and to protect the people of the States. Though earnestly sustained by the friends of the Constitution, they originated in the hostile feelings with which it was regarded by a large portion of the people, and were shaped by the jealous policy which those feelings inspired. The enemies of the Constitution saw many perils of evil in the centre, but none elsewhere. They feared tyranny in the head, not anarchy in the members, and they took their measures accordingly. The friends of the Constitution desired to obviate all just grounds of apprehension, and to give repose to the public mind. It was important to unite, as far as possible, the entire people in support of the new system which had been adopted. They felt the necessity of doing all in their power to remove every obstacle in the way of its success. The most momentous consequences for good or evil to the country were to follow in the results of the experiment. Hence the spirit of concession which animated the Convention, and hence the adoption of these amendments after the work of the Convention was done and had been approved by the people.

The Twelfth Amendment grew out of the contest between Jefferson and Burr for the presidency.

The Thirteenth Amendment is the last one made. It trenches directly upon the power of the States and of the people of the States. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the States where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the Constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever the power to restore it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against

the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

The Act of Congress confers citizenship. Who are citizens, and what are their rights? The Constitution uses the words "citizen" and "natural-born citizens;" but neither that instrument nor any Act of Congress has attempted to define their meaning. British jurisprudence, whence so much of our own is drawn, throws little light upon the subject. . . .

All persons born in the allegiance of the king are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons. 2 Kent Com. 1; *Calven's Case*, 7 Coke, 1; 4 Black. Com. 366; *Lynch v. Clark*, 1 Sandf. Ch. 139.

The common law has made no distinction on account of race or color. None is now made in England, nor in any other Christian country of Europe.

The fourth of the Articles of Confederation declared that the "free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the United States," &c. On the 25th of June, 1778, when these Articles were under consideration by the Congress, South Carolina moved to amend this fourth Article by inserting after the word "free," and before the word "inhabitants," the word "white." Two States voted for the amendment and eight against it. The vote of one was divided. *Scott v. Sanford*, 19 How. 575. When the Constitution was adopted, free men of color were clothed with the franchise of voting in at least five States, and were a part of the people whose sanction breathed into it the breath of life. *Scott v. Sanford*, 19 How. 573; *State v. Manuel*, 2 Dev. & Batt. 24, 25.

" 'Citizens' under our Constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress." 1 Kent Com. 292, note.

We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.

It is further said in the note in 1 Kent's Commentaries, before referred to: —

“If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several States may deem it expedient to prescribe to persons of color.”

In the case of *State v. Manuel*, *supra*, it was remarked:—

“It has been said that, by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State by its municipal regulations to make a citizen. But what is naturalization? It is the removal of the disabilities of alienage. Emancipation is the removal of the incapacity of slavery. The latter depends wholly upon the internal regulations of the State. The former belongs to the government of the United States. It would be dangerous to confound them.” p. 25.

This was a decision of the Supreme Court of North Carolina, made in the year 1836. The opinion was delivered by JUDGE GASTON. He was one of the most able and learned judges this country has produced. The same court, in 1848, CHIEF JUSTICE RUFFIN delivering the opinion, referred to the case of *State v. Manuel*, and said:—

“That case underwent a very laborious investigation by both the Bench and the Bar. The case was brought here by appeal, and was felt to be one of very great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence upon all questions of similar nature.” *State v. Newcomb*, 5 Ired. 253.

We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native-born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the Act of Congress conferring citizenship was unnecessary, and is inoperative. Granting this to be so, it was well, if Congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject. We are aware that a majority of the court, in the case of *Scott v. Sanford*, arrived at conclusions different from those we have expressed. But in our judgment these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that Scott was a slave. This central and controlling fact excluded all other questions, and what was said upon them by those of the majority, with whatever learning and ability the argument was conducted, is no more binding upon this court as authority than the views of the minority upon the same subjects. *Carroll v. Carroll*, 16 How. 287.

The fact that one is a subject or citizen determines nothing as to his rights as such. They vary in different localities and according to circumstances.

Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed with any other rights, civil or political.

Women, minors, and persons *non compos* are citizens, and not the less so on account of their disabilities. In England, not to advert to the various local regulations, the new reform bill gives the right of voting for members of Parliament to about eight hundred thousand persons from whom it was before withheld. There, the subject is wholly within the control of Parliament. Here, until the Thirteenth Amendment was adopted, the power belonged entirely to the States, and they exercised it without question from any quarter, as absolutely as if they were not members of the Union.

The first ten amendments to the Constitution, which are in the nature of a bill of rights, apply only to the national government. They were not intended to restrict the power of the States. *Barrows v. Mayor, &c.*, 7 Pet. 247; *Withers v. Buckley*, 20 How. 84; *Murphy v. People*, 2 Cow. 818.

Our attention has been called to several treaties by which Indians were made citizens; to those by which Louisiana, Florida, and California were acquired, and to the Act passed in relation to Texas. All this was done under the war and treaty making powers of the Constitution, and those which authorize the national government to regulate the territory and other property of the United States, and to admit new States into the Union. *American Ins. Co. v. Canter*, 1 Pet. 511; *Cross v. Harrison*, 16 How. 164; 2 Story Const. 158.

These powers are not involved in the question before us, and it is not necessary particularly to consider them. A few remarks, however, in this connection will not be out of place. A treaty is declared by the Constitution to be the "law of the land." What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void.

"The power to make colored persons citizens has been actually exercised in repeated and important instances. See the treaty with the Choctaws of September 27, 1830, art. 14; with the Cherokees of May 20, 1836, art. 12; and the treaty of Guadeloupe Hidalgo, of February 2, 1848, art. 8." *Scott v. Sanford*, 19 How. 486, opinion of CURTIS, J.

See, also, the treaty with France of April 30, 1803, by which Louisiana was acquired, art. 3; and the treaty with Spain of the 23d of February, 1819, by which Florida was acquired, art. 3.

The article referred to in the treaty with France and in the treaty with Spain is in the same language. In both the phrase "inhabitants" is used. No discrimination is made against those, in whole or in part, of

the African race. So in the treaty of Guadeloupe Hidalgo (articles 8 and 9), no reference is made to color. . . .

This brings us to the examination of the Thirteenth Amendment. It is as follows :—

“Article XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

“Section 2. Congress shall have power to enforce this article by appropriate legislation.”

Before the adoption of this amendment, the Constitution, at the close of the enumeration of the powers of Congress, authorized that body—

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof.” . . .

Without any other provision than the first section of the amendment, Congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked. Its office, then, is to repress and annul the excess; beyond that it is powerless.

We will now proceed to consider the state of things which existed before and at the time the amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing and anticipated evils.

When the late Civil War broke out, slavery of the African race subsisted in fifteen States of the Union. The legal code relating to persons in that condition was everywhere harsh and severe. An eminent writer said : “They cannot take property by descent or purchase; and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will or otherwise to the prejudice of creditors.” 2 Kent Com. 281, 282.

In a note, it is added :

“In Georgia, by an Act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporal punishment; and it is unlawful for white persons to assemble with free negroes or slaves to

teach them to read or write. The prohibitory Act of the Legislature of Alabama, passed at the session of 1831-32, relative to the instruction to be given to the slaves or free colored population, or exhortation, or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slaveholding States; but in Louisiana the law on the subject is armed with tenfold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the State any paper, book, or pamphlet having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave States. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from Kent's Commentaries. Further research would darken the picture. The States had always claimed and exercised the exclusive right to fix the status of all persons living within their jurisdiction.

On January 1, 1863, President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the Rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still subsisted in thirteen States. Its simple abolition, leaving these laws and this exclusive power of the States over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of this forecast. Al-

most simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the Act under consideration. In the presence of these facts, who will say it is not an "appropriate" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this Act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race or color, and cannot, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.

It was passed by the Congress succeeding the one which proposed the amendment. Many of the members of both Houses were the same.

This fact is not without weight and significance. *McCulloch v. Maryland*, 4 Wheat. 401.

The amendment reversed and annulled the original policy of the Constitution, which left it to each State to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects as to every one within its scope, than the consequences of a manumission by a private individual.

We entertain no doubt of the constitutionality of the Act in all its provisions.

It gives only certain civil rights. Whether it was competent for Congress to confer political rights also, involves a different inquiry. We have not found it necessary to consider the subject.

We are not unmindful of the opinion of the Court of Appeals of Kentucky, in the case of *Brown v. Commonwealth*. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the Act is sustained by the Supreme Court of Indiana, and the Chief Justice of the Court of Appeals of Maryland, in able and well-considered opinions. *Smith v. Moody*, 26 Ind. 299; *Re A. H. Somers*.

We are happy to know that if we have erred the Supreme Court of the United States can revise our judgment and correct our error.

The motion is overruled, and judgment will be entered upon the verdict.

Motion overruled.

SLAUGHTER-HOUSE CASES.

SUPREME COURT OF THE UNITED STATES. 1873.

[16 Wall. 36.]¹

Mr. John A. Campbell, and also *Mr. J. Q. A. Fellows*, argued the case at much length and on the authorities, in behalf of the plaintiffs in error.

Messrs. M. H. Carpenter and *J. S. Black* (a brief of *Mr. Charles Allen* being filed on the same side), and *Mr. T. J. Durant*, representing in addition the State of Louisiana, *contra*.

MR. JUSTICE MILLER now, April 14, 1873, delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State. . . .

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled "An Act to protect the health of the City of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or abattoirs within those limits, except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the incorporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, -and-impose upon it the

¹ The statement of facts is omitted. — ED.

Slaughter House Cases. p. 516

Some judges thought this was a mere outrage - was not defensible as being a police power. Does the case determine that the privileges and immunities of citizens means? No. not necessary to decide it. Whatever interpretation be given to that clause there is no denial of rights. If a man builds a slaughter house in the country and the city grows around him the State legislature may pass a law compelling him to remove it though it entails an immense loss on him.

52 U.S. 377 - same interpretation of the clause given

Taking the view of the minority, what are the privileges and immunities?

See page 542. Sup. a state should not discriminate against a special class, should fix a low grade of rights for all citizens - much lower than would be liked in other states. - would the federal courts interfere? No. See page 534.

Fundamental rights that are recognized in any given state are all that are protected. If all citizens of the state are denied certain rights there can be no rights.

Journal of the American People

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duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of

what rights are secured to a citizen of a territory or D.C. by 14th Amendment? What are the privileges and immunities of a citizen of a territory? Not being a citizen of a state they have only the privileges of a citizen of the U. S. strictly.

see page 520 - line 12 from the bottom is wrong. It goes too far.

Ministry say labor is property. This is a refinement but has been pretty generally followed. It may be denied as an original question.

The right to go to Washington or to a sea-port, is a privilege of a citizen of U.S.

It is said that the provision of the 14th amendment saying that no state shall pass any law abridging the privileges of citizens - added nothing whatever to the rights of a citizen under the constitution. See Cooley, Principles of Const. Law, 12th Ed., pp 256-257.

duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the Governor of the State for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens — the whole of the butchers of the city — of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the Act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The Act divides itself into two main grants of privilege, — the one in reference to stock-landings and stock-yards, and the other to slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety

and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body — the supreme power of the State or municipality — to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else.

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the Legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

“Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all,” says Chancellor Kent, 2 Commentaries, 340, “be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.” This is called the police power; and it is declared by Chief Justice Shaw, *Commonwealth v. Alger*, 7 Cush. 84, that it is much easier to perceive and realize

the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge (*Thorpe v. Rutland and Burlington Railroad Co.*, 27 Vt. 149), "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise. . . . [Here the court briefly considers *Gibbons v. Ogden*, 9 Wheat. 1, *New York v. Miln*, 11 Pet. 102, *The License Tax*, 5 Wall. 471, and *United States v. Dewitt*, 9 Wall. 41.]

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the Act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges — privileges which it is said constitute a monopoly — the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of

corporation.

It was as if the city of New Orleans had been given the power duty to tend to slaughtering.

This was not involuntary servitude. It did not abridge the privilege of minorities.

If a corporation is the best means of accomplishing a certain end, and the legislature may create it.

McCulloch v. The State of Maryland, 4 Wheat. 316, in relation to the power of Congress to organize the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana Legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the Legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

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The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question, has displayed a research into the history of monopolies in England and the European Continent, only equalled by the eloquence with which they are denounced.

But it is to be observed, that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the Crown; for who ever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macanlay clearly establishes that the contest was between the Crown, and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day continued to grant to persons and corporations exclusive privileges, — privileges denied to other citizens, — privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the Legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the Constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:—

- 1) That it creates an involuntary servitude forbidden by the thirteenth article of amendment;
- 2) That it abridges the privileges and immunities of citizens of the United States; *Art XIV.*
- 3) That it denies to the plaintiffs the equal protection of the laws; and, *art XIV*
- 4) That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.¹ We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

articles Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of

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1 The oldest in office, Mr. Justice CLIFFORD, had succeeded CURTIS, J., in January, 1858. No one of the bench who had decided the case of *Dred Scott v. Sandford*, was now present, except Mr. Justice Campbell, — and he was at the bar now, and counsel for the plaintiffs. — ED. ?

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amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the War of the Rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

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“ 2. Congress shall have power to enforce this article by appropriate legislation.”

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government — a declaration designed to establish the freedom of four millions of slaves — and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word “involuntary,” which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word “servitude” is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word “slavery” had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of *habeas corpus* under this article, illustrates this course of observation. *Matter of Turner*, 1 Abbott United States Reports, 84. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the Rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

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They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men,

either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the Rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the Fourteenth Amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the Fifteenth Amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." The negro having, by the Fourteenth Amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the Fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolly labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood [as saying] is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott Case*, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States.¹ This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

“All persons born or naturalized in the United States, and subject to its jurisdiction.”

¹ An inadvertence. See *ante*, pp. 491 n. and 493 n. — ED.

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever

they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the Articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. . . . [Here the court cites and briefly considers *Corfield v. Coryell*, 4 Wash. C. C. 371, *Ward v. Maryland*, 12 Wall. 430, and *Paul v. Virginia*, 8 Wall. 180.]

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Fed-

eral government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection,

and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall v. Nevada*, 6 Wall. 36. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several States." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States;" and it is, as such citizens, that their rights are supported in this court in *Crandall v. Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

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But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment under consideration.

"All persons born or naturalized in the United States, and subject

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

“Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.”

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. (We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number, of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are
*Affirmed.*¹

¹ CHIEF JUSTICE CHASE and the JUSTICES FIELD, BRADLEY, and SWAYNE dissented, and opinions were given by the last three.

MR. JUSTICE FIELD argued that the legislation in question was not a legitimate exercise of what is called the police power, but was an attempt to take from private persons and to vest exclusively in a corporation the right to pursue a lawful and necessary calling. It may or may not, he said, be forbidden by the Thirteenth Amendment. But it certainly is by the Fourteenth, for it denies to citizens of the United States fundamental rights belonging to the citizens of all free governments. The Fourteenth Amendment secures citizens of the United States in the same fundamental rights which are guaranteed in the body of the Constitution (art. 4, s. 2) to citizens of

BARTEMEYER v. IOWA.

SUPREME COURT OF THE UNITED STATES. 1873.

[18 Wall. 129.]

ERROR to the Supreme Court of Iowa, the case being thus :

Bartemeyer, the plaintiff in error, was tried before a justice of the peace, on the charge of selling intoxicating liquors, on the 8th of March, 1870, to one Timothy Hickey, in Davenport township, in the State of Iowa, and was acquitted. On an appeal to the Circuit Court of the State the defendant filed the following plea :

“ And now comes the defendant, F. Bartemeyer, and for plea to the information in this cause says : He admits that at the time and place mentioned in said information he did sell and deliver to one Timothy Hickey one glass of intoxicating liquor called whiskey, and did then and there receive pay in lawful money from said Hickey for the same. But

the States as against hostile legislation from States other than their own. It protects them against monopolies and secures equality of right in pursuing the ordinary avocations of life.

MR. JUSTICE BRADLEY, concurring in this opinion, added that the Louisiana statute deprived people of both liberty and property, and also of the equal protection of the laws. The right of choice in adopting lawful employments “ is a portion of their liberty : their occupation is their property.”

MR. JUSTICE SWAYNE agreed with both these dissenting opinions, and expressed the view that liberty in the Fourteenth Amendment “ is freedom from all restraints but such as are justly imposed by law. . . . Property is everything which has an exchangeable value. . . . Labor is property. . . . The right to make it available is next in importance to the rights of life and liberty.”

In *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1885), MATTHEWS, J., for the court, said : “ The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says : ‘ Nor shall any State deprive any person of life, liberty, or property without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality ; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes, that ‘ all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.’ The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

“ It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment ; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances, — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.” — Ed.

Dissenting judges in the Slaughter House Cases concur in the decision here. Judge Field p 536 says that 14th amendment never interfered with the police power of a state. Wrong. It was surely intended to cut down the police power of the states. It did cut down that power very much

tenced to pay a fine of \$20 and costs. A bill of exceptions was taken, and the case carried to the Supreme Court of Iowa, and that court affirmed the judgment of the Circuit Court and rendered a judgment

Police power is the undefined residuum of power in the states. It is obvious that the conspicuous purpose of the 14th amendment was to cut down this unclassified power

of error, was in violation of the fourteenth amendment to the Constitution. . . .

Mr. W. T. Dittoe, for the plaintiff in error; Mr. H. O'Connor, Attorney-General of Iowa, for the State, *contra*.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court, as follows:

The case has been submitted to us on printed argument. That on the part of the plaintiff in error has taken a very wide range, and is largely composed of the arguments familiar to all, against the right of the States to regulate traffic in intoxicating liquors. So far as this argument deals with the mere question of regulating this traffic, or even its total prohibition, as it may have been affected by anything in the Federal Constitution prior to the recent amendments of that instrument, we do not propose to enter into a discussion. Up to that time it had been considered as falling within the police regulations of the States, left to their judgment, and subject to no other limitations than such as were imposed by the State Constitution, or by the general principles supposed to limit all legislative power. It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States.

mentioned in said information he did sell and deliver to one Timothy Hickey one glass of intoxicating liquor called whiskey, and did then and there receive pay in lawful money from said Hickey for the same. But

IN *LICK BROS. v. Hopkins*, 110 U. S. 550, 569 (1883), MATTHEWS, J., for the court, said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

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defendant alleges that he committed no crime known to the law by the selling of the intoxicating liquor hereinbefore described to said Hickey, for the reason that he, the defendant, was the lawful owner, holder, and possessor, in the State of Iowa, of said property, to wit, said one glass of intoxicating liquor, sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the Act for the Suppression of Intemperance, and being chapter sixty-four of the revision of 1860; and that, prior to the passage of said Act for the Suppression of Intemperance, he was a citizen of the United States and of the State of Iowa."

Without any evidence whatever the case was submitted to the court on this written plea, the parties waiving a jury, and a judgment was rendered that the defendant was guilty as charged, and he was sentenced to pay a fine of \$20 and costs. A bill of exceptions was taken, and the case carried to the Supreme Court of Iowa, and that court affirmed the judgment of the Circuit Court and rendered a judgment for costs against the defendant, who now brought the case here on error.

There was sufficient evidence that the main ground relied on to reverse the judgment in the Supreme Court of Iowa was, that the Act of the Iowa Legislature on which the prosecution was based, was in violation of the Constitution of the United States. . . .

The case was submitted on printed arguments some time ago, and when the *Slaughter-House Cases*, reported in 16th Wallace, 36, were argued; the position of the plaintiff in error in this case being, as it partly was in those, that the Act of the State legislature, the maintenance of which by the courts below was the ground of the writ of error, was in violation of the Fourteenth Amendment to the Constitution. . . .

Mr. W. T. Dittoe, for the plaintiff in error; *Mr. H. O'Connor*, Attorney-General of Iowa, for the State, *contra*.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court, as follows:

The case has been submitted to us on printed argument. That on the part of the plaintiff in error has taken a very wide range, and is largely composed of the arguments familiar to all, against the right of the States to regulate traffic in intoxicating liquors. So far as this argument deals with the mere question of regulating this traffic, or even its total prohibition, as it may have been affected by anything in the Federal Constitution prior to the recent amendments of that instrument, we do not propose to enter into a discussion. Up to that time it had been considered as falling within the police regulations of the States, left to their judgment, and subject to no other limitations than such as were imposed by the State Constitution, or by the general principles supposed to limit all legislative power. It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States.

But the case before us is supposed by counsel of the plaintiff in error to present a violation of the Fourteenth Amendment of the Constitution, on the ground that the Act of the Iowa Legislature is a violation of the privileges and immunities of citizens of the United States which that amendment declares shall not be abridged by the States; and that in his case it deprives him of his property without due process of law.

As regards both branches of this defence, it is to be observed that the statute of Iowa, which is complained of, was in existence long before the amendment of the Federal Constitution, which is thus invoked to render it invalid. Whatever were the privileges and immunities of Mr. Bartemeyer, as they stood before that amendment, under the Iowa statute, they have certainly not been abridged by any action of the State legislature since that amendment became a part of the Constitution. And unless that amendment confers privileges and immunities which he did not previously possess, the argument fails. But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal government, and are secured by the Federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer v. The People*, 3 Kernan, 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter-House Cases*, 16 Wallace, 36.

But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for judicial action by this court?

Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration.

They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position.

In the case before us, the Supreme Court of Iowa, whose judgment we are called on to review, did not consider it. They said that the record did not present it.

It is true the bill of exceptions, as it seems to us, does show that the defendant's plea was all the evidence given, but this does not remove the difficulty in our minds. The plea states that the defendant was the owner of the glass of liquor sold prior to the passage of the law under which the proceedings against him were instituted, being chapter sixty-four of the revision of 1860.

If this is to be treated as an allegation that the defendant was the owner of that glass of liquor prior to 1860, it is insufficient, because the revision of the laws of Iowa of 1860 was not an enactment of new laws, but a revision of those previously enacted; and there has been in existence in the State of Iowa, ever since the code of 1851, a law strictly prohibiting the sale of such liquors; the Act in all essential particulars under which the defendant was prosecuted, amended in some immaterial points. If it is supposed that the averment is helped by the statement that he owned the liquor before the law was passed, the answer is that this is a mere conclusion of law. He should have stated when he became the owner of the liquor, or at least have fixed a date when he did own it, and leave the court to decide when the law took effect, and apply it to his case. But the plea itself is merely argumentative, and does not state the ownership as a fact, but says he is not guilty of any offence, because of such fact.

If it be said that this manner of looking at the case is narrow and technical, we answer that the record affords to us on its face the strongest reason to believe that it has been prepared from the beginning, for the purpose of obtaining the opinion of this court on important constitutional questions without the actual existence of the facts on which such questions can alone arise.

It is absurd to suppose that the plaintiff, an ordinary retailer of drinks, could have proved, if required, that he had owned that particular glass of whiskey prior to the prohibitory liquor law of 1851.

The defendant, from his first appearance before the justice of the peace to his final argument in the Supreme Court, asserted in the record in various forms that the statute under which he was prosecuted was a violation of the Constitution of the United States. The act of the prosecuting attorney, under these circumstances, in going to trial without any replication or denial of the plea, which was intended manifestly to raise that question, but which carried on its face the strongest probability of its falsehood, satisfies us that a moot case was deliberately made up to raise the particular point when the *real* facts of the case would not have done so. As the Supreme Court of Iowa did not consider this question as raised by the record, and passed no opinion

on it, we do not feel at liberty, under all the circumstances, to pass on it on this record.

The other errors assigned being found not to exist, the judgment of the Supreme Court of Iowa is affirmed.

[JUSTICES BRADLEY and FIELD read concurring opinions, restating the views of the minority in the *Slaughter-House Cases*. The former, speaking for himself and JUSTICES FIELD and SWAYNE, said: . . . "By that portion of the Fourteenth Amendment by which no State may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty, or property, without due process of law, it has now become the fundamental law of this country that life, liberty, and property (which include 'the pursuit of happiness') are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law. The monopoly created by the Legislature of Louisiana, which was under consideration in the *Slaughter-House Cases*, was, in my judgment, legislation of this sort and obnoxious to this objection. But police regulations, intended for the preservation of the public health and the public order, are of an entirely different character. So much of the Louisiana law as partook of this character was never objected to. It was the unconscionable monopoly, of which the police regulation was a mere pretext, that was deemed by the dissenting members of the court an invasion of the right of the citizen to pursue his lawful calling. A claim of right to pursue an unlawful calling stands on very different grounds, occupying the same platform as does a claim of right to disregard license laws and to usurp public franchises. It is greatly to be regretted, as it seems to me, that this distinction was lost sight of (as I think it was) in the decision of the court referred to."

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MR. JUSTICE FIELD said: . . . "No one has ever pretended, that I am aware of, that the Fourteenth Amendment interferes in any respect with the police power of the State. . . . It was because the Act of Louisiana transcended the limits of police regulation, and asserted a power in the State to farm out the ordinary avocations of life, that dissent was made to the judgment of the court sustaining the validity of the Act."¹]

page
472
note

means so

¹ See Pomeroy's Constitutional Law (Bennett's ed.) s. 256 e. — Ed.

uch that the statement here can not be true.
the 14th Amend. does interfere with many of the unclassified
unclassified powers: the police power.
Field is wrong; there is no magic in the word police power.
Whatever is necessary to the existence of a state cannot be
taken away by 14th Amendment, but
It was the literal purpose of the 14th amendment to cut
down some of those unclassified police powers

BUTCHERS' UNION SLAUGHTER-HOUSE, &c., COMPANY
v. CRESCENT CITY, &c., SLAUGHTER-HOUSE COMPANY.

SUPREME COURT OF THE UNITED STATES. 1883.

[111 U. S. 746.]

IN 1869, the Legislature of Louisiana granted the appellee exclusive privileges for stock-landing and slaughter-houses, at New Orleans for twenty-five years, which were sustained by this court in the *Slaughter-House Cases*, 16 Wall. 36. In 1881, under a provision of the State Constitution of 1879, the municipal authorities granted privileges for slaughter-houses and stock-landing at New Orleans to the appellants. The appellee as plaintiff below filed its bill in the Circuit Court to restrain the appellants from exercising the privileges thus conferred. A preliminary injunction was granted, which, on hearing, was made perpetual. From this decree the defendants below appealed. The legislation and other facts bearing upon the issues are stated in the opinion of the court.

Mr. B. R. Forman, for appellant.

Mr. Thomas J. Semmes, for appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the Circuit Court for the Eastern District of Louisiana.

The appellee brought a suit in the Circuit Court to obtain an injunction against the appellant forbidding the latter from exercising the business of butchering, or receiving and landing live-stock intended for butchering, within certain limits in the parishes of Orleans, Jefferson, and St. Bernard, and obtained such injunction by a final decree in that court.

The ground on which this suit was brought and sustained is that the plaintiffs had the exclusive right to have all such stock landed at their stock-landing place, and butchered at their slaughter-house, by virtue of an Act of the General Assembly of Louisiana, approved March 8th, 1869, entitled, "An Act to protect the health of the City of New Orleans, to locate the stock-landing and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

An examination of that statute, especially of its fourth and fifth sections, leaves no doubt that it did grant such an exclusive right.

The fact that it did so, and that this was conceded, was the basis of the contest in this court in the *Slaughter-House Cases*, 16 Wall. 36, in which the law was assailed as a monopoly forbidden by the Thirteenth and Fourteenth Amendments to the Constitution of the United States, and these amendments as well as the Fifteenth, came for the first time before this court for construction. The constitutional power of the State to enact the statute was upheld by this court.

This power was placed by the court in that case expressly on the ground that it was the exercise of the police power which had remained with the States in the formation of the original Constitution of the United States, and had not been taken away by the amendments adopted since.

Citing the definition of this power from Chancellor Kent, it declares that the statute in question came within it. "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all" (he says) "be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interest of the community." 2 Kent's Commentaries, 340; 16 Wall. 62. In this latter case it was added that "the regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power."

But in the year 1879 the State of Louisiana adopted a new Constitution, in which were the following articles:

"Article 248. The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits; provided no monopoly or exclusive privilege shall exist in this State, nor such business be restricted to the land or houses of any individual or corporation; provided the ordinances designating places for slaughtering shall obtain the concurrent approval of the Board of Health or other sanitary organization.

"Article 258. . . . The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

Under the authority of these articles of the Constitution the municipal authorities of the city of New Orleans enacted ordinances which opened to general competition the right to build slaughter-houses, establish stock-landings, and engage in the business of butchering in that city under regulations established by those ordinances, but which were in utter disregard of the monopoly granted to the Crescent City Company, and which in effect repealed the exclusive grant made to that company by the Act of 1869.

The appellant here, the Butchers' Union Slaughter-House Company, availing themselves of this repeal, entered upon the business, or were about to do so, by establishing their slaughter-house and stock-landing within the limits of the grant of the Act of 1869 to the Crescent City Company.

Both these corporations, organized under the laws of Louisiana and

Butchers' Union v. Crescent City Co p 537

Below, the old charter was sustained and the new co. was enjoined from acting. Held then that the charter of the corp. was a contract which the state could not impair.

Supreme Ct. held that the old charter could be thus done away with and a new corp. created, on the ground of the police power. When a matter concerns the public health or the public morals our legislature can not bind the hands of another. This power can not be bargained away.

There was a contract with the old corp. But you may say it was not a contract within the meaning of the Clause of the Const which says that no state shall impair the obligation of a contract. Why isn't it within that clause? Why isn't it that kind of contract? Simply because the const. didn't cover the subject matter of this contract.

doing business in that State, were citizens of the same State, and could not, in respect of that citizenship, sue each other in a court of the United States.

The Crescent City Company, however, on the allegation that these constitutional provisions of 1879 and the subsequent ordinances of the city, were a violation of their contract with the State under the Act of 1869, brought this suit in the Circuit Court as arising under the Constitution of the United States, art. 1, sec. 10. That court sustained the view of the plaintiff below, and held that the Act of 1869 and the acceptance of it by the Crescent City Company, constituted a contract for the exclusive right mentioned in it for twenty-five years; that it was within the power of the Legislature of Louisiana to make that contract, and

Butchers Union.

No particular legislative body can cut down the fullness of power of its successors. The case supports the power of later legislatures. In other words a legislature can not be controlled as to its police power.

This is getting away from the Dartmouth case as to contracts. There are some contracts then that are not protected by the Const.

A state constitution is a law within the meaning of the clause that no state shall pass a law impairing the obligation of contracts

... or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute-book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all

doing business in that State, were citizens of the same State, and could not, in respect of that citizenship, sue each other in a court of the United States.

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No one can examine the provisions of the Act of 1869 with the knowledge that they were accepted by the Crescent City Company, and so far acted on that a very large amount of money was expended in a vast slaughter-house, and an equally extensive stock-yard and landing-place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration.

It admits of as little doubt that the ordinance of the city of New Orleans, under the new Constitution, impaired the supposed obligation imposed by those provisions on the State, by taking away the exclusive right of the company granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract.

We do not think it necessary to spend time in demonstrating either of these propositions. We do not believe they will be controverted.

The appellant, however, insists that, so far as the Act of 1869 partakes of the nature of an irrevocable contract, the legislature exceeded its authority, and it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case.

Let us see clearly what it is.

It does not deny the power of that legislature to create a corporation, with power to do the business of landing live-stock and providing a place for slaughtering them in the city. It does not deny the power to locate the place where this shall be done exclusively. It does not deny even the power to give an exclusive right, for the time being, to particular persons or to a corporation to provide this stock-landing and to establish this slaughter-house.

But it does deny the power of that legislature to continue this right so that no future legislature nor even the same body can repeal or modify it, or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute-book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all

that was decided by this court in the *Slaughter-House Cases*. But it asserts the right of the legislature to repeal such a statute, or to make a new one inconsistent with it, whenever, in the wisdom of such legislature, it is for the good of the public it should be done.

Nor does this proposition contravene the established principle that the legislature of a State may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed nor its obligation impaired. The examples are numerous where this has been done and the contract upheld.

The denial of this power, in the present instance, rests upon the ground that the power of the legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well-known but undefined power called the police power. We have not found a better definition of it for our present purpose than the extract from Kent's Commentaries in the earlier part of this opinion. "The power to regulate unwholesome trades, slaughter-houses, operations offensive to the senses," there mentioned, points unmistakably to the powers exercised by the Act of 1869, and the ordinances of the city under the Constitution of 1879. While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

It cannot be permitted that, when the Constitution of a State, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure.

This principle has been asserted and repeated in this court in the last few years in no ambiguous terms.

The first time it seems to have been distinctly and clearly presented, was in the case of *Boyd v. Alabama*, 94 U. S. 645. That was a writ of error to the Supreme Court of Alabama, brought by Boyd, who had been convicted in the courts of that State of carrying on a lottery contrary to law. In his defence, he relied upon a statute which authorized lotteries for a specific purpose, under which he held a license. The repeal of this statute, which made his license of no avail against the general law forbidding lotteries, was asserted by his counsel to be void as

impairing the obligation of the contract, of which his license was evidence, and the Supreme Court of Alabama had in a previous case held it to be a contract.

In Boyd's case, however, that court held the law under which his license was issued to be void, because the object of it was not expressed in the title, as required by the Constitution of the State. This court followed that decision, and affirmed the judgment on that ground.

But in the concluding sentences of the opinion by Mr. Justice Field, the court, to repel the inference that the contract would have been irrepealable, if the statute had conformed to the special requirement of the Constitution, said:

"We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals," citing *Moore v. The State*, 48 Miss. 147, and *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, 663.

Dictum

This cautionary declaration received the unanimous concurrence of the court, and a year later the principle became the foundation of the decision in the case of *The Beer Company v. Massachusetts*, 97 U. S. 25, 28. . . . [Here the court considers the case last named, and also *Stone v. Mississippi*, 101 U. S. 814, and *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.]

These cases are all cited and their views adopted in the opinion of the Supreme Court of Louisiana in a suit between the same parties in regard to the same matter as the present case, and which was brought to this court by writ of error and dismissed before a hearing by the present appellee.

The result of these considerations is that the Constitution of 1879 and the ordinances of the city of New Orleans, which are complained of, are not void as impairing the obligation of complainant's contract, and that

*The decree of the Circuit Court must be reversed, and the case remanded to that court with directions to dismiss the bill.*¹

¹ JUSTICES FIELD and BRADLEY (with the latter of whom agreed JUSTICES HARLAN and WOODS) gave concurring opinions, in which they again restated the views of the minority in the *Slaughter-House Cases*.

FIELD, J., said: ". . . As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,'—that is, so plain that their truth is recognized upon their mere statement,—'that all men are endowed'—not by edicts of emperors, or decrees of Parliament, or acts of Congress, but 'by their Creator with certain inalienable rights,'—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime.—'and that among these are life, liberty, and the pursuit of happiness, and to secure these'—not grant them, but secure

them — 'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said that, 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' — ADAM SMITH'S *Wealth of Nations*, Bk. I. Chap. 10. . . . The first section of the amendment is stripped of all its protective force, if its application be limited to the privileges and immunities of citizens of the United States as distinguished from citizens of the States, and thus its prohibition be extended only to the abridgment or impairment of such rights, as the right to come to the seat of government, . . . which are specified in the opinion in the *Slaughter-House Cases* as the special rights of such citizens. If thus limited, nothing was accomplished by adopting it. The States could not previously have interfered with these privileges and immunities, or any other privileges and immunities which citizens enjoyed under the Constitution and laws of the United States. . . . Whilst, therefore, I fully concur in the decision of the court that it was entirely competent for the State to annul the monopoly features of the original Act incorporating the plaintiff, I am of opinion that the Act, in creating the monopoly in an ordinary employment and business, was to that extent against common right and void."

BRADLEY, J. (speaking also for JUSTICES HARLAN and WOODS), said: . . . "I do not mean to say that there are no exclusive rights which can be granted, or that there are not many regulative restraints on civil action which may be imposed by law. . . . But this concession does not in the slightest degree affect the proposition (which I deem a fundamental one), that the ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, — the liberty of pursuit. . . . It abridges the privileges of citizens of the United States; it deprives them of a portion of their liberty and property, without due process of law; and it denies to them the equal protection of the laws. 1. I hold that the liberty of pursuit — the right to follow any of the ordinary callings of life — is one of the privileges of a citizen of the United States. . . . 2. But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And, if a man's right to his calling is property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans, were deprived, by the law in question, of their property, as well as their liberty, without due process of law. 3. But still more apparent is the violation, by this monopoly law, of the last clause of the section, — 'no State shall deny to any person the equal protection of the laws.' If it is not a denial of the equal protection

STRAUDER v. WEST VIRGINIA

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Strander v. West Va

This person was excluded from the jury in accordance with a law of the state.

In the next case there was no law expressly. But a state acts when its authorized agent acts.

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State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him

of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition. Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market, and in many other ways. If by legislative enactment they can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended. In my judgment, the present Constitution is amply sufficient for the protection of the people if it is fairly interpreted and faithfully enforced." — Ed.

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STRAUDER v. WEST VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 U. S. 303.]

ERROR to the Supreme Court of Appeals of the State of West Virginia.

The facts are stated in the opinion of the court.

Mr. Charles Devens and *Mr. George O. Davenport*, for the plaintiff in error.

Mr. Robert White, Attorney-General of West Virginia, and *Mr. James W. Green*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that, "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him

of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition. Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market, and in many other ways. If by legislative enactment they can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended. In my judgment, the present Constitution is amply sufficient for the protection of the people if it is fairly interpreted and faithfully enforced." — ED.

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as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man." This petition was denied by the State court, and the cause was forced to trial.

Motions to quash the *venire*, "because the law under which it was issued was unconstitutional, null, and void," and successive motions to challenge the array of the panel, for a new trial, and in arrest of judgment were then made, all of which were overruled and made by exceptions parts of the record.

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872-73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are State officials.

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . . . [Sect. 1 of the Fourteenth Amendment is here recited.]

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases*, 16 Wall. 36, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and

ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . .

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed exclud-

ing all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection. . . .

We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down

all possible legal discriminations against those who belong to it. To quote further from 16 Wall., *supra*: "In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the Revised Statutes.

A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539. So in *United States v. Reese*, 92 U. S. 214, it was said by the Chief Justice of this court: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." But there is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sect. 641 is such a provision. . . .

We have heretofore considered and affirmed the constitutional power of Congress to authorize the removal from State courts into the circuit courts of the United States, before trial, of criminal prosecutions for alleged offences against the laws of the State, when the defence presents a Federal question, or when a right under the Federal Constitution or laws is involved. *Tennessee v. Davis*, *supra*, p. 257. It is unnecessary now to repeat what we there said.

That the petition of the plaintiff in error, filed by him in the State court before the trial of his case, made a case for removal into the Federal Circuit Court. under sect. 641, is very plain, if, by the constitutional amendment and sect. 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio County; and it is

So ordered.

[FIELD and CLIFFORD, JJ., dissented.]

EX PARTE VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 U. S. 339.]

PETITION for a writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Mr. James G. Field, Attorney-General of Virginia, and *Mr. William J. Robertson*, for the petitioner.

Mr. Attorney-General Devens and *Mr. Assistant Attorney-General Smith*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

The petitioner, J. D. Coles, was arrested, and he is now held in custody under an indictment found against him in the District Court of the United States for the Western District of Virginia. The indictment alleged that he, being a judge of the county court of Pittsylvania County of that State, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county in the year 1878, did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him excluded from the jury lists made out by him as such judge, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the statute of the United States in such case made and provided.

Being thus in custody, he has presented to us his petition for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record of the District Court, in order that he may be discharged; and he avers that

the District Court had and has no jurisdiction of the matters charged against him in said indictment; that they constitute no offence punishable in said District Court; and that the finding of said indictment, and his consequent arrest and imprisonment, are unwarranted by the Constitution of the United States, or by any law made in pursuance thereof, and are in violation of his rights and of the rights of the State of Virginia, whose judicial officer he is.

A similar petition has been presented by the State of Virginia, praying for a *habeas corpus* and for the discharge of the said Coles. Accompanying both these petitions are exhibited copies of the indictment, the bench-warrant, and the return of the marshal, showing the arrest of the said Coles and his detention in custody.

Both these petitions have been considered as one case, and the first question they present is, whether this court has jurisdiction to award the writ asked for by the petitioners. . . . Our conclusion, then, is that we are empowered to grant the writ in such a case as is presented in these petitions. We come now to the merits of the case.

The indictment and bench-warrant, in virtue of which the petitioner Coles has been arrested and is held in custody, have their justification, — if any they have, — in the Act of Congress of March 1, 1875, sect. 4. 18 Stat., part 3, 336. That section enacts that “no citizen, possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000.” The defendant has been indicted for the misdemeanor described in this Act, and it is not denied that he is now properly held in custody to answer the indictment, if the Act of Congress was warranted by the Constitution. The whole merits of the case are involved in the question, whether the Act was thus warranted. . . .

One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. We had occasion in the *Slaughter-House Cases*, 16 Wall. 36, to express our opinion of their spirit and purpose, and to some extent of their meaning. We have again been called to consider them in *Tennessee v. Davis*, 100 U. S. 257, and *Strauder v. West Virginia*, Id. 303. In this latter case . . . we held, further, that this protection

and this guarantee, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.

All of the amendments derive much of their force from this latter provision. It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. . . .

We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, "No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it. . . .

We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.

It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of

a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?

But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the Act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.

Upon the whole, as we are of opinion that the Act of Congress upon which the indictment against the petitioner was founded is constitutional, and that he is correctly held to answer it, and as, therefore, no object would be secured by issuing a writ of *habeas corpus*, the petitions are
Denied.

[FIELD, J., for himself and CLIFFORD, J., gave a dissenting opinion.]

IN *Ex parte Yarbrough*, 110 U. S. 651 (1883), in denying a petition for a writ of *habeas corpus* for the release of several persons, sentenced and imprisoned for conspiracy to intimidate persons of African descent from voting at an election for a member of Congress, the court (MILLER, J.) said: "It is said that the parties assaulted in these cases are not officers of the United States, and their protection in exercising the right to vote by Congress does not stand on the same ground.

"But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States.

"In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

"This proposition answers also another objection to the constitutionality of the laws under consideration, namely, that the right to vote for

a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively.

“ If this were conceded, the importance to the general government of having the actual election — the voting for those members — free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government, it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by law of the United States, or by their united result.

“ But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.

“ The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled; namely, by election.

“ Its language is: ‘The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.’ Article 1, section 2.

“ The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

“ It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State.

“ Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor v. Happersett*, 21 Wall. 162, that ‘the Constitution of the United States does not confer the right of suffrage upon any one,’ without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument.

“ But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men.

“ In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons, by the Constitution alone, because you have to look to the law of

the State for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

“The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States. It is in the following language:—

“‘SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

“‘SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.’

“While it is quite true, as was said by this court in *United States v. Reese*, 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding States had not removed from their constitutions the words ‘white man’ as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. *Neal v. Delaware*, 103 U. S. 370.

“In such cases this Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

“In the case of *United States v. Reese*, so much relied on by counsel, this court said in regard to the Fifteenth Amendment, that ‘it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.’ This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

“The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary.

“The reference to cases in this court in which the power of Congress under the first section of the Fourteenth Amendment has been held to relate alone to acts done under State authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself.”

CIVIL RIGHTS CASES.

SUPREME COURT OF THE UNITED STATES. 1883.

[109 U. S. 3.]

THESE cases were all founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled “An Act to protect all Citizens in their Civil and Legal Rights.” 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire’s theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, “said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude.” The case of Robinson and wife against the Memphis & Charleston R. R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of five hundred dollars given by the second section of the Act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies’ car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the Act of Congress; and the principal point

made by the exceptions was, that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the Act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together, by the Solicitor-General at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 29th day of March, 1883.

Mr. Solicitor-General Phillips, for the United States.

Mr. William M. Randolph, for Robinson and wife, plaintiffs in error.

Mr. William Y. C. Humes and *Mr. David Posten* for the Memphis and Charleston Railroad Co., defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court. After stating the facts in the above language he continued:

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows: [These sections are given in a note below.]¹

¹ "SEC. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty afore-

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due pro-

said, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.”

cess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State Acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States v. Cruikshank*, 92 U. S. 542; *Virginia v. Rives*, 100 U. S. 313; and *Ex parte Virginia*, 100 U. S. 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State

courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a State law was passed impairing the obligation of a contract, and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law; and under the broad provisions of the Act of March 3d, 1875, ch. 137, 18 Stat. 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any Federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against State laws impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation

which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the Act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In *Ex parte Virginia*, 100 U. S. 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same Act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9th, 1866, 14 Stat. 27, ch. 31, and re-enacted with some modifications in sections 16, 17, 18, of the Enforcement Act, passed May 31st, 1870, 16 Stat. 140, ch. 114. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person

being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the Act. This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory: thus preserving the corrective character of the legislation. Rev. St. §§ 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment: and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Con-

gress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States v. Harris*, 106 U. S. 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon

this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by State laws under the Fourteenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a State law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the State law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal

right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct

and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the States by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth

Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Fourteenth and Fifteenth Amendments.

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States v. Michael Ryan*, and of *Richard A. Robinson and Wife v. The Memphis & Charleston Railroad Company*, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the Act of Congress of March 1st, 1875, entitled "An Act to protect all Citizens in their Civil and Legal Rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly.

*And it is so ordered.*¹

[HARLAN, J., gave a dissenting opinion.]

¹ Compare *The Civil Rights Bill*, Hughes, 541 (1875), *Younger v. Judah*, 111 Mo. 303 (1892). — Ed.

So to be

PEOPLE v. KING.

NEW YORK COURT OF APPEALS. 1888.

[110 N. Y. 418.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 9, 1886, which affirmed a judgment of the Court of Sessions of Chenango County, entered upon a verdict convicting defendant of a misdemeanor. (Reported below, 42 Hun, 186.)

The substance of the indictment and the material facts are stated in the opinion.

E. H. Prindle, for appellant.

George P. Pudney, for respondent.

ANDREWS, J. Section 383 of the Penal Code declares that "no citizen of this State can, by reason of race, color, or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theatres or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations." The violation of this section is made a misdemeanor, punishable by fine of not less than fifty nor more than five hundred dollars.

The defendant and one Scott, in the year 1884, were the owners and proprietors of a skating-rink in the village of Norwich, in this State, erected in that year upon their own lands. Prior to June 13, 1884, they announced, through the public press and otherwise, that the rink would be opened on the evening of that day, and they arranged with the "Apollo" Club, of Binghamton, to attend the opening to give an exhibition of roller-skating, the profits of the entertainment to be divided between the club and the proprietors of the rink. Tickets of admission were sold on the evening in question by the agents of the proprietor, at the office on the premises, but persons who had not procured tickets were admitted on payment of the charge for admission at the door. Several hundred persons attended the exhibition. During the evening three colored men made application to purchase tickets at the office where tickets were sold, but the agents of the proprietors, having charge of the sale, acting in accordance with the instructions of the defendant, refused to sell them tickets, because they were persons of color, and they were so informed at the time. The defendant was indicted under the section of the Penal Code above quoted, the indictment alleging, in substance, that the defendant, being one of the owners of a skating-rink, a place of amusement, did, on the day named, exclude from said skating-rink, and from the equal enjoyment of any and all accommodation, facility, and privilege of said skating-rink, George F. Breed, William Wyckoff, Charles Robbins, and others, all being citizens of the

be aware of the Civil Rights Cases - from the volume E. G.

State, by reason of race and color, etc. The objection is now taken that the indictment is defective, in substance, in not averring the means by which the exclusion of the persons mentioned was effected. The objection is untenable. The indictment follows the statute, and it was not necessary to aver, with any greater particularity than was used, the circumstances constituting the offence. *People v. West*, 106 N. Y. 293. Nor is there any force in the suggestion that proof of a refusal to sell to the colored men tickets of admission at the office did not support the allegation that they were excluded from the rink. The defendant provided tickets as evidence of the right of persons having them to admission. He refused to furnish this evidence to the persons named in the indictment, which was furnished to all others who applied, placing the refusal on a ground which justified the applicants in supposing, and the jury in finding, that the defendant thereby intended to exclude them, and did thereby exclude them, from the rink.

The real question in the case arises upon the contention of the counsel for the appellant that the statute upon which the indictment is founded, so far as it undertakes to prescribe that the owner of a place of amusement shall not exclude therefrom any citizen by reason of race, color, or previous condition of servitude, is an unconstitutional interference with private rights, in that it restricts the owner of property in respect to its lawful use, and as to an incident which is not a legitimate matter of regulation by law.

The legislation in question is not without precedent. The Act of Congress of March 1, 1875, entitled "An Act to protect all Persons in their Civil Rights" (18 U. S. Stat. at Large, 335), contains a section identical in import with section 383 of the Penal Code, except that it is still broader in its scope, and secures, not to citizens only, but to all persons within the jurisdiction of the United States, the equal enjoyment of the accommodation, advantages, facilities, and privileges of "inns, public conveyances on land and water, theatres, and other places of public amusement, subject only to the limitations established by law, and applicable to citizens of every race and color, regardless of any previous condition of servitude." The Civil Rights Act of Mississippi, passed February 7, 1873, contains a similar provision. In Louisiana, the matter is made the subject of a constitutional enactment, ordaining that "all persons shall enjoy equal rights and privileges, etc., in every place of public resort;" and this was supplemented by Acts of the Legislature of Louisiana, passed in 1870 and 1871.

It is not necessary, at this day, to enter into any argument to prove that the clause in the Bill of Rights that no person shall "be deprived of life, liberty, or property without due process of law" (Const. art. 1, § 6), is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense, against unlawful invasion by the government, in the exertion of governmental power in any of its departments, but also protects every

essential incident to the enjoyment of those rights. The interpretation of this time-honored clause has been considered, in recent cases in this court, with a fulness and completeness which leaves nothing to be said by way of support or illustration. *Wynehamer v. People*, 13 N. Y. 378; *Bertholf v. O'Reilly*, 74 Id. 509; *In re Jacobs*, 98 Id. 98; *People v. Marx*, 99 Id. 377.

But, as the language of the constitutional prohibition implies, life, liberty, and property may be justly affected by law, and the statutes abound in examples of legislation limiting or regulating the use of private property, restraining freedom of personal action or controlling individual conduct, which, by common consent, do not transcend the limitations of the Constitution. This legislation is under what, for lack of a better name, is called the police power of the State, — a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the legislature exercises a supervision over matters involving the common weal, and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which the courts cannot interfere. In short, the police power covers a wide range of particular unexpressed powers reserved to the State affecting freedom of action, personal conduct, and the use and control of property. "All property," said Shaw, C. J., in *Comm. v. Alger*, 7 Cush. 85, "is held subject to those general regulations which are necessary to the common good and general welfare." This power, of course, is subject to limitations. The line of demarcation between its lawful and unlawful exercise it is often difficult to trace. We have held that it cannot be exerted for the destruction of property lawfully held and acquired under existing laws, or of any of the essential attributes of such property (*Wynehamer v. People*, *supra*); nor to deprive an individual of the right to pursue a lawful business on his own premises, not injurious to the public health, or otherwise inimical to the public interests (*In re Jacobs*, *supra*); nor to prevent the manufacture or sale of a useful article of food. *People v. Marx*, *supra*. But we have held that the legislature may lawfully subject the owner of premises to pecuniary liability for injuries resulting from intoxication caused in whole or in part by the use of liquor sold by the lessee therein, although the sale itself was lawful (*Bertholf v. O'Reilly*, *supra*); and it was held by the Supreme Court of the United States, in *Munn v. Illinois*, 94 U. S. 113, that a State law regulating the licensing of elevators for the handling and storage of grain, and fixing a maximum charge therefor, was not repugnant to that part of the Fourteenth Amendment of the Constitution of the United States which ordains that "no State shall deprive any person of life, liberty, or property without due process of law."

In considering whether the enactment of section 383 of the Penal Code transcends legislative power, it is important to have in mind the purpose of the enactment. It cannot be doubted that it was enacted with special reference to citizens of African descent, nor is there any doubt that the policy which dictated the legislation was to secure to such persons equal rights with white persons to the facilities furnished by carriers, innkeepers, theatres, schools, and places of public amusement. The race-prejudice against persons of color, which had its root, in part at least, in the system of slavery, was by no means extinguished when, by law, the slaves became freemen and citizens. But this great act of justice towards an oppressed and enslaved people imposed upon the nation great responsibilities. They became entitled to all the privileges of citizenship, although the great mass of them were poorly prepared to discharge its obligations. The nation secured the inviolability of the freedom of the colored race and their rights as citizens by the Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States. The Fourteenth Amendment ordained, among other things, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." The construction of the Fourteenth Amendment has come under the consideration of the Supreme Court of the United States in several cases, among others, in two cases known as the jury cases, — *Strauder v. West Virginia*, 100 U. S. 303, and *Ex parte Virginia*, Id. 339. In the case first mentioned it was held that a State law confining the selection of jurors to white persons was in contravention of the Fourteenth Amendment; and in the second, that the action of the State officer invested with the power to select jurors, excluding all colored persons from the lists, was also repugnant to its provisions. In *Strauder v. West Virginia*, Strong, J., speaking for the majority of the court, said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right most valuable to the colored men, — the right of exemption from unfriendly legislation against them distinctively as colored; exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

We have referred to these amendments and to the cases construing them, because they disclose the fact that, in the judgment of the nation, the public welfare required that no State should be permitted to establish by law such a discrimination against persons of color as was made by the defendant in this case, for we think it incontestable that a State law excluding colored people from admission to places of public amusement would be considered as a violation of the Federal Constitution. It would seem, indeed, in view of the Act of March 1, 1875, that, in the opinion of Congress, the amendments had a much

broader scope, and prevented not only discriminating legislation of this character by the State, but also such discrimination by individuals, since the jurisdiction of Congress to pass a law forbidding the exclusion of persons of color from places of public amusement, and annexing a penalty for its violation, must be derived, if it exists, from the Thirteenth, Fourteenth, and Fifteenth Amendments.¹ It cannot be doubted that before they were adopted the power to enact such a regulation resided exclusively in the States. But independently of the inference arising from the solemn assertion by the nation, through its action in adopting the amendments, that legal discriminations against persons of color by the action of States was opposed to the public welfare, it is not difficult to see that there is a public interest which justified the enactment of section 385 of the Code, provided it did not overstep the limits of lawful interference with the uses of private property. The members of the African race, born or naturalized in this country, are citizens of the States where they reside and of the United States. Both justice and the public interest concur in a policy which shall elevate them as individuals and relieve them from oppressive or degrading discrimination, and which shall encourage and cultivate a spirit which will make them self-respecting, contented, and loyal citizens, and give them a fair chance in the struggle of life, weighted, as they are at best, with so many disadvantages. It is evident that to exclude colored people from places of public resort on account of their race is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people. It is, of course, impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts and to equal enjoyment of privileges of a *quasi* public character. The law cannot be set aside, because it has no basis in the public interest, and the promotion of the public good is the main purpose for which the police power may be exerted; and whether, in a given case, it shall be exerted or not, the legislature is the sole judge, and a law will not be held invalid because, in the judgment of a court, its enactment was inexpedient or unwise.

The final question, therefore, is, does the law in question invade the right of property protected by the Constitution? The State could not pass a law making the discrimination made by the defendant. The amendments to the Federal Constitution would forbid it. May not the State impose upon individuals having places of public resort the same restriction which the Federal Constitution places upon the State? It is not claimed that that part of the statute giving to colored people equal rights, at the hands of innkeepers and common carriers, is an infraction of the Constitution. But the business of an innkeeper or a common carrier, when conducted by an individual, is a private business, receiving no special privilege or protection from the State. By the common law,

¹ See the *Civil Rights Cases*, 109 U. S. 3; *ante*, p. 554. — ED.

innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do. The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.

The statute in question assumes to regulate the conduct of owners or managers of places of public resort in the respect mentioned. The principle stated by Waite, C. J., in *Munn v. Illinois*, *supra*, which received the assent of the majority of the court, applies in this case. "Where," says the Chief Justice, "one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." In the judgment of the legislature the public had an interest to prevent race discrimination between citizens, on the part of persons maintaining places of public amusement, and the *quasi* public use to which the owner of such a place devoted his property, gives the legislature a right to interfere. If the defendant, instead of basing his exclusion of a class of citizens upon color, had made a rule excluding all Germans, or all Irishmen, or all Jews, the law as applied to such a case would have seemed entirely reasonable. *United States v. Newcombe* [U. S. Dist. Ct.], 4 Phila. 519. But the principle is the same, and if the law could be sustained in the one case, it may in the other. The validity of similar statutes in Mississippi and Louisiana has been sustained by the courts in those States. *Donnell v. The State*, 48 Miss. 661; *Joseph v. Bidwell*, 28 La. 382. The statute does not interfere with private entertainments, or prevent persons not engaged in the business of keeping a place of public amusement, from regulating admission to social, public, or private entertainments given by them as they may deem best, nor does it seek to compel social equality. It was, we think, a valid exercise of the police power of the State over a subject within the cognizance of the legislature.

The judgment should be affirmed.

All concur, except PECKHAM and GRAY, JJ., dissenting; RUGER, C. J., concurring in result. *Judgment affirmed.*¹

¹ And so *Ferguson v. Gies*, 82 Mich. 358 (1890), as to restaurants, where the statute is said to be only declaratory of the common law, as now understood in that State; *Baylies v. Curry*, 128 Ill. 287 (1889). Compare *Central R. R. Co. v. Green*, 86 Pa. St. 427 (1878); *R. R. Co. v. Brown*, 17 Wall. 445 (1873).—ED.

LEHEW v. BRUMMELL.

SUPREME COURT OF MISSOURI. 1890.

[103 Mo. 546.]

E. M. Harber, for appellants.*R. A. DeBolt*, for respondents.

BLACK, J. The five plaintiffs in this case reside in School District Number 4, in Grundy County, and each has children entitled to attend the public school maintained therein for the education of white children. In September, 1887, when this suit was commenced, the defendant Barr was the teacher, and three of the defendants were directors of the school district. The defendant Brummell is a man of African descent, and at the last-mentioned date had four children, all of whom resided with him in said district and were of the ages entitling them to attend the public schools. These four children were the only colored children of school age in the district. No separate school was ever established or maintained therein for the education of colored children; but there was such a separate school in the town of Trenton in the same county, three and one-half miles from Brummell's residence. No white child in District Number 4 had to go more than two miles to reach the school-house. These colored children were permitted to attend the school maintained for white children in District Number 4 for a short time.

On the foregoing facts a temporary injunction was awarded the plaintiffs, restraining Brummell's children from attending the school so established for white children, which was made perpetual on the final hearing of the cause, and the defendants appealed.

But two questions are presented by the briefs for our consideration. The first is, that the laws of this State concerning the education of colored children are in conflict with section 1 of the Fourteenth Amendment of the Constitution of the United States, and, therefore, void.

Section 1, of article 11, of the Constitution of this State, makes it the duty of the General Assembly to establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years; and section 3 of the same article declares: "Separate free public schools shall be established for the education of children of African descent."

A system of free public schools has been established by general laws throughout the State, and for all the purposes of this case it will be sufficient to notice the statutes concerning colored schools. . . .

These statute laws simply carry out and put in operation the command of that section of our Constitution before quoted, and the objection now made is levelled at the constitutional provision, and it is that which we are asked to strike down, because of the contention that it violates section 1 of the Fourteenth Amendment of the Constitution of the United States. . . .

We then come to the last clause, which is prohibitory of State action. It says, nor shall any State deny to any person within its jurisdiction the equal protection of the laws. Speaking of this clause in its application to State legislation as to colored persons, Justice Strong said: "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" *Strauder v. West Virginia*, 100 U. S. 303. We then come to the simple question whether our Constitution and the statutes passed pursuant to it, requiring colored persons to attend schools established and maintained at public expense for the education of colored persons only, deny to such persons "equal protection of the laws."

It is to be observed in the first place that these persons are not denied the advantages of the public schools. The right to attend such schools and receive instruction thereat is guaranteed to them. The framers of the Constitution and the people by their votes in adopting it, it is true, were of the opinion that it would be better to establish and maintain separate schools for colored children. The wisdom of the provision is no longer a matter of speculation. Under it, the colored children of the State have made a rapid stride in the way of education, to the great gratification of every right-minded man. The schools for white and black persons are carried on at a great public expense, and it has been found expedient and necessary to divide them into classes. That separate schools may be established for male and female pupils cannot be doubted. No one would question the right of the legislature to provide separate schools for neglected children who are too far advanced in years to attend the primary department; for such separate schools would be to the great advantage of that class of pupils. So, too, schools may be classed according to the attainments of the attendants in the branches taught. That schools may be classed on these and other grounds without violating the clause of the Federal Constitution now in question, must be conceded. But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage.

It is true Brummell's children must go three and one-half miles to reach a colored school, while no white child in the district is required to go further than two miles. The distance which these children must

go to reach a colored school is a matter of inconvenience to them, but it is an inconvenience which must arise in any school system. The law does not undertake to establish a school within a given distance of any one, white or black. The inequality in distances to be travelled by the children of different families is but an incident to any classification, and furnishes no substantial ground of complaint. *People ex rel. King v. Gallagher*, 93 N. Y. 438-451.

The fact must be kept in mind, for it lies at the foundation of this controversy, that the laws of this State do not exclude colored children from the public schools. Such children have all the school advantages and privileges that are afforded white children. The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited, "Equality and not identity of privileges and rights is what is guaranteed to the citizen." Our conclusion is that the Constitution and laws of this State providing for separate schools for colored children are not forbidden by, or in conflict with, the Fourteenth Amendment of the Federal Constitution; and the courts of last resort in several States have reached the same result. *People ex rel. King v. Gallagher, supra*; *State ex rel. Garnes v. McCann*, 21 Ohio St. 198; *Cory v. Carter*, 48 Ind. 328; *Ward v. Flood*, 48 Cal. 36.

A like result was reached in Massachusetts under a constitutional provision similar to the Fourteenth Amendment as to the question in hand. *Roberts v. The City of Boston*, 5 Cushing, 198. We are, also, of the opinion that our conclusion is in accord with the cases cited from the Supreme Court of the United States, the final arbiter of all such questions.¹

[The second point, turning on the want of proper parties, is omitted.]

¹ And so *Chrisman v. Brookhaven*, 70 Miss. 477 (1892). In this case the court (CAMPELL, C. J.) remarks that, "The Constitution of 1890 embodies by express provision, in s. 207, the rule which has always prevailed in this State, that 'separate schools shall be maintained for children of the white and colored races.'" The same doctrine is held as regards legislation requiring railway companies to "provide equal but separate accommodations for the white and colored races;" in *Ex parte Plessy*, 11 So. Rep. 948 (La. Dec. 1892). Compare *Louisv., &c. Ry. Co. v. Miss.*, 133 U. S. 587.

In *Roberts v. The City of Boston*, 5 Cush. 198 (1850), before the Fourteenth Amendment, a similar question was elaborately argued before the Supreme Court of Massachusetts by Charles Sumner (3 *Pierce's Life of Sumner*, 40, 41). In an often-cited opinion the court (SUAW, C. J.) said: "The plaintiff, a colored child of five years of age, has commenced this action, by her father and next friend, against the city of Boston, upon the statute of 1845, c. 214, which provides, that any child unlawfully excluded from public-school instruction, in this Commonwealth, shall recover damages therefor, in an action against the city or town by which such public-school instruction is supported. The question therefore is, whether, upon the facts agreed, the plaintiff has been unlawfully excluded from such instruction.

"By the agreed statement of facts, it appears, that the defendants support a class of schools called primary schools, to the number of about one hundred and sixty, designed for the instruction of children of both sexes, who are between the ages of four and

seven years. Two of these schools are appropriated by the primary school committee, having charge of that class of schools, to the exclusive instruction of colored children, and the residue to the exclusive instruction of white children.

"The plaintiff, by her father, took proper measures to obtain admission into one of these schools appropriated to white children, but pursuant to the regulations of the committee, and in conformity therewith, she was not admitted. Either of the schools appropriated to colored children was open to her; the nearest of which was about a fifth of a mile or seventy rods more distant from her father's house than the nearest primary school. It further appears, by the facts agreed, that the committee having charge of that class of schools had, a short time previously to the plaintiff's application, adopted a resolution, upon a report of a committee, that in the opinion of that board, the continuance of the separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the instruction of that class of the population. . . .

"The plaintiff had access to a school, set apart for colored children, as well conducted in all respects, and as well fitted, in point of capacity and qualification of the instructors, to advance the education of children under seven years old, as the other primary schools; the objection is, that the schools thus open to the plaintiff are exclusively appropriated to colored children, and are at a greater distance from her home. Under these circumstances, has the plaintiff been unlawfully excluded from public-school instruction? Upon the best consideration we have been able to give the subject, the court are all of opinion that she has not.

"It will be considered that this is a question of power, or of the legal authority of the committee intrusted by the city with this department of public instruction; because, if they have the legal authority, the expediency of exercising it in any particular way is exclusively with them.

"The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the Constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.

"Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law, in this Commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.

"Legal rights must, after all, depend upon the provisions of law; certainly all those rights of individuals which can be asserted and maintained in any judicial tribunal. The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make. The provision, that it shall be the duty of legislatures and magistrates to cherish the interests of literature and the sciences, especially the University at Cambridge, public schools, and grammar schools, in the towns, is precisely of this character. Had the legislature failed to comply with this injunction, and neglected to provide public schools in the towns, or should they so far fail in their duty as to repeal all laws on the subject, and leave all education to depend

IN RE LOOK TIN SING.

CIRCUIT COURT OF THE UNITED STATES, CALIFORNIA. 1884.

[10 *Sawyer*, 353.]

BEFORE FIELD, Circuit Justice, SAWYER, Circuit Judge, and SABIN, District Judge.¹

T. D. Riordan and *William M. Stewart*, for the petitioner; *S. G. Hilborn*, United States Attorney, *Carroll Cook*, Assistant United States Attorney, and *John N. Pomeroy*, for the United States.

By the Court, FIELD, CIRCUIT JUSTICE. The petitioner belongs to the

on private means, strong and explicit as the direction of the Constitution is, it would afford no remedy or redress to the thousands of the rising generation, who now depend on these schools to afford them a most valuable education, and an introduction to useful life.

"We must then resort to the law, to ascertain what are the rights of individuals, in regard to the schools. By the Rev. Sts. c. 23, the general system is provided for. . . .

"In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive. The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.

"It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction, and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment.

"The increased distance, to which the plaintiff was obliged to go to school from her father's house is not such, in our opinion, as to render the regulation in question unreasonable, still less illegal.

"On the whole the court are of opinion, that upon the facts stated, the action cannot be maintained."
Plaintiff nonsuit.

Compare *West Chester, &c. R. R. Co. v. Miles*, 55 Pa. St. 209 (1867). In *Board of Education v. Timmon*, 26 Kans. 1 (1881), it was held that in the absence of clear legislative authority, a board of education could not establish separate schools for white and colored persons. For the purpose of the opinion it was assumed, although doubt was intimated, that the legislature might authorize such a separate system. BREWER, J., dissented.

With this case are *People v. The Board of Education*, 101 Ill. 308 (1882). Compare *Coger v. N. W. Packet Co.*, 37 Iowa, 145 (1873); *The Sue*, 22 Fed. Rep. 843 (1885); *Logwood v. Memphis, &c. R. Co.*, 23 Fed. Rep. 318 (1885); *The Civil Rights Bill*, Hughes, 541 (1875).—ED.

¹ JUDGE HOFFMAN did not sit on the hearing of this case, but he was on the Bench when the opinion was delivered, and concurred in the views expressed.

Chinese race, but he was born in Mendocino, in the State of California, in 1870. In 1879 he went to China, and returned to the port of San Francisco during the present month (September, 1884), and now seeks to land, claiming the right to do so as a natural-born citizen of the United States. It is admitted by an agreed statement of facts that his parents are now residing in Mendocino, in California, and have resided there for the last twenty years; that they are of the Chinese race, and have always been subjects of the Emperor of China; that his father sent the petitioner to China, but with the intention that he should return to this country; that the father is a merchant at Mendocino, and is not here in any diplomatic or other official capacity under the Emperor of China. The petitioner is without any certificate, under the Act of 1882, or of 1884, and the District Attorney of the United States, intervening for the government, objects to his landing for the want of such certificate.

The first section of the Fourteenth Amendment to the Constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words "subject to the jurisdiction thereof." They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them, when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. (This extra-territoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. Persons born on a public vessel of a foreign country, whilst within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted.) They are considered as born in the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States.

The language used has also a more extended purpose. It was designed to except from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognized the right of every one to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British Crown, as belonging to every human being — God-given

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and inalienable — the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial dicta that a citizen cannot renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law; and this would seem to have been the opinion of Chancellor Kent when he published his Commentaries. But a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government. And we adopt as citizens those belonging to our race, who, coming from other lands, manifest attachment to our institutions and desire to be incorporated with us. So profoundly convinced are we of the right of these immigrants from other countries to change their residence and allegiance, that as soon as they are naturalized they are deemed entitled, with the native-born, to all the protection which the government can extend to them wherever they may be, at home or abroad. And the same right which we accord to them to become citizens here is accorded to them as well as to the native-born, to transfer their allegiance from our government to that of other States.

In an opinion of Attorney-General Black, in the case of a native Bavarian, who came to this country, and, after being naturalized, returned to Bavaria, and desired to resume his status as a Bavarian, this doctrine is maintained. "There is," he says, "no statute or other law of the United States which prevents either a native or naturalized citizen from severing his political connection with this government, if he sees proper to do so in time of peace, and for a purpose not directly injurious to the interests of the country." There is no mode of renunciation prescribed. In my opinion, if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations to the United States, and I do not think we could, or would, afterward claim from him any of the duties of a citizen." 9 Opin. Atty.-Gens. 62.

The doctrine thus stated has long been received in the United States as a settled rule of public law; and in the treaty of 1868 between China and this country, the right of man to change his home and allegiance is recognized as "inherent and inalienable." 16 Stats., p. 740, art. 5. And in the recital of an Act of Congress passed nearly at the same time with the signing of the treaty, this right is assumed to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and in the body of the Act, "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation," is declared to be "inconsistent with the fundamental principles" of our government. 13 Stats. 223;

R. S., sect. 1999. { So, therefore, if persons born or naturalized in the United States have removed from the country and renounced, in any of the ordinary modes of renunciation, their citizenship, they thenceforth cease to be subject to the jurisdiction of the United States. }

With this explanation of the meaning of the words in the Fourteenth Amendment, "subject to the jurisdiction thereof," it is evident that they do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship; and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.

The clause as to citizenship was inserted in the amendment not merely as an authoritative declaration of the generally recognized law of the country so far as the white race is concerned, but also to overrule the doctrine of the *Dred Scott Case*, affirming that persons of the African race brought over to this country and sold as slaves, and their descendants, were not citizens of the United States nor capable of becoming such. 19 How. 393. The clause changed the entire status of these people. It lifted them from their condition of mere freedmen and conferred upon them, equally with all other native-born, the rights of citizenship. { When it was adopted, the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws. } So the inability of persons to become citizens under those laws in no respect impairs the effect of their birth, or of the birth of their children, upon the status of either as citizens under the amendment in question.

Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship. This subject was elaborately considered by Assistant Vice-Chancellor Sandford in *Lynch v. Clarke*, found in the first volume of his reports. 1 Sandf. 583. In that case one Julia Lynch, born in New York, in 1819, of alien parents, during their temporary sojourn in that city, returned with them the same year to their native country, and always resided there afterwards. It was held that she was a citizen of the United States.

After an exhaustive examination of the law, the Vice-Chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen; and added, that this was the general understanding of the legal profession, and the universal impression of the public mind. In illustration of this general understanding, he mentions the fact, that when at an election an inquiry is made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country the answer is received as conclusive that he is a citizen; that no one inquires further; no one asks whether his

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parents were citizens or foreigners ; it is enough that he was born here whatever was the status of his parents. He shows also that legislative expositions on the subject speak but one language, and he cites to that effect not only the laws of the United States, but the statutes of a great number of the States, and establishes conclusively that there is on this subject a concurrence of legislative declaration with judicial opinion, and that both accord with the general understanding of the profession and of the public.¹

Whether it be possible for an alien, who could be naturalized under our laws, to renounce for his children, whilst under the age of majority, the right of citizenship, which by those laws he could acquire for them, it is unnecessary to consider, as no such question is presented here. Nor is the further question before us whether, if he cannot become a citizen, he can, by his act, release any right conferred upon them by the Constitution.

As to the position of the District Attorney that the Restriction Act prevents the re-entry of the petitioner into the United States, even if he be a citizen, only a word is necessary. The petitioner is the son of a merchant, and not a laborer within the meaning of the Act. Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws and beyond the power of Congress. The petitioner must be allowed to land, and it is so ordered.²

¹ In 1855 Congress passed the following Act, securing citizenship to children of citizens of the United States born without their limits:—

CHAPTER LXXI. — *An Act to secure the Right of Citizenship to Children of Citizens of the United States born out of the Limits thereof.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were, or shall be at the time of their birth, citizens of the United States, shall be deemed and considered, and are hereby declared to be, citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

SEC. 2. And be it further enacted, that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen.

Approved February 10, 1855.

The provisions of this statute are re-enacted in the Revised Statutes in sections 1993 and 1994.

² Compare *McKay v. Campbell*, 2 Sawyer, U. S. C. C. Oregon, 118 (1871).

As to the power of the political departments of the government to keep out aliens, and to remove them, see *Chae Chan Ping v. U. S.*, 130 U. S. 581 (1889); *Nishimura Ekiu v. U. S.*, 142 U. S. 651 (1892); and *Fong Yue Ting v. U. S.*, 149 U. S. 699, s. c. ante, p. 374. — ED.

WORCESTER v. THE STATE OF GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1832.

[6 *Pet.* 515.]¹

ERROR to the Superior Court for the county of Gwinnett in the State of Georgia. The plaintiff in error, being a missionary residing among the Cherokee Indians in Georgia by permission of the United States, was indicted under a statute of Georgia forbidding such residence without a license from the authorities of the State, and was convicted and sentenced to imprisonment.

Sergeant and Wirt, with whom also was *Elisha W. Chester*.

MARSHALL, C. J., delivered the opinion of the court. . . .

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, this power, in its utmost extent, was admitted to reside in the Crown. When our Revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these United Colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, Congress assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

¹ The statement of facts is shortened. — Ed.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to Congress, and prohibited them to the States, respectively, unless a State be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." This instrument also gave the United States in Congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims, produced representations to Congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by Congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister

States, and by the government of the United States. Various Acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no State could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States. A review of these Acts, on the part of Georgia, would occupy too much time, and is the less necessary, because they have been accurately detailed in the argument at the Bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others whom he could not remove and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State. Examples of this kind are not wanting in Europe. “Tributary and feudatory States,” says Vattel, “do not thereby cease to be sovereign and independent States, so long as self-government and sovereign and independent authority are left in the administration of the State.” At the present day, more than one State may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the Acts of Congress. The whole

intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.

The Act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. Can this court revise, and reverse it?

If the objection to the system of legislation, lately adopted by the Legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the Acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guarantee to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the Acts of Congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the President of the United States, is also a violation of the Acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guaranteeing the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the Constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws, and treaties of his country.

This point has been elaborately argued and, after deliberate consideration, decided, in the case of *Cohens v. The Commonwealth of Virginia*, 6 Wheat. 264.

It is the opinion of this court that the judgment of the Superior Court for the county of Gwinnett, in the State of Georgia, condemning Samuel A. Worcester to hard labor, in the penitentiary of the State of Georgia, for four years, was pronounced by that court under color of a law which is void, as being repugnant to the Constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

[The concurring opinions of McLEAN, J. and WASHINGTON, J., and the dissenting opinion of BALDWIN, J., are omitted.]¹

IN *Elk v. Wilkins*, 112 U. S. 94 (1884), on error to the Circuit Court of the United States for the District of Nebraska, the plaintiff, an Indian, had brought an action against the defendant, the registrar of a ward in Omaha, for refusing to register him as a qualified voter. The case turned on the question whether the plaintiff was a citizen of the United States. The court (GRAY, J.) in holding that he was not, said: "The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution.

"Under the Constitution of the United States, as originally established, 'Indians not taxed' were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several States; and Congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the States of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. . . .

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States, they were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of

¹ See *Cherokee Nation v. Ga.*, 5 Pet. 1 (1831). — Ed.

it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life. . . .

“The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which ‘no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;’ and ‘the Congress shall have power to establish an uniform rule of naturalization.’ Constitution, art. 2, sect. 1; art. 1, sect. 8. . . .

“This section [Amendment XIV., s. 1] contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof.’ The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the Naturalization Acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

“Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. . . .

“Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being ‘naturalized in the United States,’ by or under some treaty or statute. . . .

“Since the ratification of the Fourteenth Amendment, Congress has passed several Acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become, without any action of the government, citizens of the United States. . . .

“There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the Fourteenth Amendment, and of the condition of the Indians at the time of its proposal and ratification.

“The Act of July 27, 1868, ch. 249, declaring the right of expatriation

to be a natural and inherent right of all people, and reciting that 'in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship,' while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another, without being naturalized under its authority. 15 Stat. 223; Rev. Stat. § 1999.

"The provision of the Act of Congress of March 3, 1871, ch. 120, that 'hereafter no Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty,' is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 Stat. 566; Rev. Stat. § 2079.

"In the case of *United States v. Elm*, 23 Int. Rev. Rec. 419, decided by Judge Wallace in the District Court of the United States for the Northern District of New York, the Indian who was held to have a right to vote in 1876 was born in the State of New York, one of the remnants of a tribe which had ceased to exist as a tribe in that State; and by a statute of the State it had been enacted that any native Indian might purchase, take, hold and convey lands, and, whenever he should have become a freeholder to the value of one hundred dollars, should be liable to taxation, and to the civil jurisdiction of the courts, in the same manner and to the same extent as a citizen. N. Y. Stat. 1843, ch. 87. The condition of the tribe from which he derived his origin, so far as any fragments of it remained within the State of New York, resembled the condition of those Indian nations of which Mr. Justice Johnson said in *Fletcher v. Peck*, 6 Cranch, 87, 146, that they 'have totally extinguished their national fire, and submitted themselves to the laws of the States;' and which Mr. Justice McLean had in view, when he observed in *Worcester v. Georgia*, 6 Pet. 515, 580, that in some of the old States, 'where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the State had been extended over them, for the protection of their persons and property.' See also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive Acts of the United States as distinct political communities, *Danzell v. Webquish*, 108 Mass. 133; *Pells v. Webquish*, 129 Mass. 469; Mass. Stat. 1862, ch. 184; 1869, ch. 463.

"The passages cited as favorable to the plaintiff from the opinions delivered in *Ex parte Kenyon*, 5 Dillon, 385, 390, in *Ex parte Reynolds*, 5 Dillon, 394, 397, and in *United States v. Crook*, 5 Dillon, 453, 464, were *obiter dicta*. The *Case of Reynolds* was an indictment in the Circuit Court of the United States for the Western District of

Arkansas for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge Parker in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never was an Indian in any sense. 5 Dillon, 397, 404. Each of the other two cases was a writ of *habeas corpus*; and any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to that writ. *Case of the Hottentot Venus*, 13 East, 195; *Case of Dos Santos*, 2 Brock. 493; *In re Kaine*, 14 How. 103. In *Kenyon's Case*, Judge Parker held that the court in which the prisoner had been convicted had no jurisdiction of the subject-matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, 'this alone would be conclusive of this case.' 5 Dillon, 390. In *United States v. Crook*, the Ponca Indians were discharged by Judge Dundy because the military officers who held them were taking them to the Indian Territory by force and without any lawful authority (5 Dillon, 468), and in the case at bar, as the record before us shows, that learned judge concurred in the judgment below for the defendant.

"The law upon the question before us has been well stated by Judge Deady in the District Court of the United States for the District of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: 'Being born a member of "an independent political community" — the Chinook — he was not born subject to the jurisdiction of the United States — not born in its allegiance.' *McKay v. Campbell*, 2 Sawyer, 118, 134. And in a later case he said: 'But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.' *United States v. Osborne*, 6 Sawyer, 406, 409.

"Upon the question whether any action of a State can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the State of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See *Chirac v. Chirac*, 2 Wheat. 259; *Fellows v. Blacksmith*, 19 How. 366; *United States v. Holliday*, 3 Wall. 407, 420; *United States v. Joseph*, 94 U. S. 614, 618.

"The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no

right secured by the Fifteenth Amendment, and cannot maintain this action."

Judgment affirmed.

[HARLAN, J., for himself, and WOODS, J., gave a dissenting opinion in which it was said that "according to the doctrines of the court, in this case — if we do not wholly misapprehend the effect of its decision — the plaintiff, if born while his parents were members of an Indian tribe, would not be embraced by the amendment, even had he been, at the time it was adopted, a permanent resident of one of the States, subject to taxation, and, in fact, paying property and personal taxes, to the full extent required of the white race in the same State."]¹

UNITED STATES *v.* KAGAMA.

SUPREME COURT OF THE UNITED STATES. 1886.

[118 U. S. 375.]

Mr. Solicitor-General, for plaintiff in error. *Mr. Joseph D. Redding*, for defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The case is brought here by certificate of division of opinion between the Circuit Judge and the District Judge holding the Circuit Court of the United States for District of California.

The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation.

Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows:—

"3. Whether the provisions of said section 9 (of the Act of Congress of March 3, 1885), making it a crime for one Indian to commit murder

¹ By the United States Land-in-Severalty Act of February 8, 1887, s. 6 (1 Supp. to Rev. St. U. S. 536), "Every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States."

As to the status of tribal Indians in the different States, see *Danzell v. Webquish*, 108 Mass. 133; *Seneca Nation v. Christie*, 126 N. Y. 122; *State v. Newell*, 24 Atl. Rep. 943 (Maine, 1892); *The Cherokee Trust Funds*, 117 U. S. 288, 303. In the last-named case it is said of eleven or twelve hundred Cherokees who remained at the East when the "Nation" was removed to the West, "They ceased to be a part of the Cherokee Nation, and henceforth they became citizens of and were subject to the laws of the State in which they resided." In *State v. Newell*, this language is quoted as applicable to all the Indians of Maine. In Massachusetts by a statute of 1869 (c. 463, s. 1) all Indians in the State were declared to be "citizens of the Commonwealth."
— ED.

upon another Indian, upon an Indian reservation situated wholly within the limits of a State of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States?"

"6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong?"

The indictment sets out in two counts that Kagama, alias Pactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, at Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation, and it charges Mahawaha, alias Ben, also an Indian, with aiding and abetting in the murder.

The law referred to in the certificate is the last section of the Indian Appropriation Act of that year, and is as follows:—

"§ 9. That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 Stat. ch. 341, 362; § 9, 385.

The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offence is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the Territory on that subject, and tried by its courts. This proposition itself is new in legislation of Congress, which has heretofore only undertaken to punish

an Indian who sustains the usual relation to his tribe, and who commits the offence in the Indian country, or on an Indian reservation, in exceptional cases; as where the offence was against the person or property of a white man, or was some violation of the trade and intercourse regulations imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offences when they are committed by one Indian on the person or property of another.

The second is where the offence is committed by one Indian against the person or property of another, within the limits of a State of the Union, but on an Indian reservation. In this case, of which the State and its tribunals would have jurisdiction if the offence was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offence had been committed at some place within the exclusive jurisdiction of the United States. (The first clause subjects all Indians guilty of these crimes committed within the limits of a Territory, to the laws of that Territory, and to its courts for trial. The second, which applies solely to offences by Indians which are committed within the limits of a State and the limits of a reservation, subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance, as asserting this jurisdiction over the Indians within the limits of the States of the Union.

Although the offence charged in this indictment was committed within a State and not within a Territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.

The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.

In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which, of course, excluded nearly all of that race, but which meant that if there were such within a State as were taxed to support the government, they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, excluding Indians not taxed, is found in the XIVth amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes, distinct from the ordinary citizens of a State or Territory.

The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

This clause is relied on in the argument in the present case, the

...for the tribal Indians on a reserva
...within a state.

proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of *The Cherokee Nation v. The State of Georgia*, 5 Pet. 1, 20, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign States, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit.

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of

...clause of 14th amendment: persons born & in
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things they were or had not been, under
jurisdiction of U.S. Suppose Indian
are not within jurisdiction of U.S. Do they
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exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy v. Ramsey*, 114 U. S. 15, 44.

In the case of *American Ins. Co. v. Canter*, 1 Pet. 511, 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, Marshall, Chief Justice, said: "Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

In the case of the *United States v. Rogers*, 4 How. 567, 572, where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by and become a member of the Cherokee tribe, Chief Justice Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe, and they hold with the assent of the United States, and under their authority." After referring to the policy of the European nations and the United States in asserting dominion over all the country discovered by them, and the justice of this course, he adds: "But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of the States, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian."

The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadalupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.

Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they

tribal sovereignty. If a people living on our territory drop to pieces and become dangerous we
as a nation then we control them do we

roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of *The Cherokee Nation v. Georgia*, 5 Pet. 1. and in the case of *Worcester v. State of Georgia*, 6 Pet. 515. 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable resumé of the treaties and statutes concerning the Indian tribes previous to and during the confederation.

In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. (In this spirit the United States has conducted its relations to them from its organization to this time.) But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure — to govern them by Acts of Congress. This is seen in the Act of March 3, 1871, embodied in § 2079 of the Revised Statutes:

"No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The case of *Crow Dog*, 109 U. S. 556, in which an agreement with the Sioux Indians, ratified by an Act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of

occupy an anomalous position. Though the Indians are said to own land and have title yet they have simply a kind of occupancy

its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal § 2146 of the Revised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the Act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State.

Is this latter fact a fatal objection to the law? The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress *has* done this, and *can* do it, with regard to all offences relating to matters to which the Federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offence (murder) is one which in almost all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offence under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

In the case of Worcester v. The State of Georgia, above cited, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel

their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts.

The same thing was decided in the case of *Follows v. Blacksmith & Others*, 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so was in the United States. See also the case of the *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761.

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

*We answer the questions propounded to us, that the 9th section of the Act of March, 1885, is a valid law in both its branches, and that the Circuit Court of the United States for the District of California has jurisdiction of the offence charged in the indictment in this case.*¹

¹ See also *Gon-shay-ee*, Pet'r, 130 U. S. 343 (1889), and *U. S. v. Osborne*, 6 Sawyer, U. S. C. C. Rep. (Oregon) 406 (1880).

The legal and political condition of the tribal Indians was carefully treated, in 1891, in two articles entitled "A People without Law," in the October and November numbers of the "Atlantic Monthly," Vol. 68, pp. 540, 676. Of the leading modern statutes, of general application, relating to these people, it is there said (p. 676): "Three important laws regarding the Indians remain to be mentioned, one of which was incorporated in the Revised Statutes.

"(a) A statute of March 3, 1871, reads: 'No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty,'—saving, however, the obligation of previous treaties. . . . Yet we do make 'agreements' with them as with a separate people; and the chief result of this law is, and was intended to be, that it is no longer the President and Senate (the treaty-making power) that conclude these measures, but the legislative body, Congress. This statute was the result of a struggle on the part of the House of Representatives to share in these proceedings, and was forced upon the Senate on the last day of a session by putting it into an appropriation bill. It was thought at the time by so competent an observer as General Walker, formerly Commissioner of Indian Affairs, to be 'a deadly blow at the tribal autonomy;' and so it was, in the logic of it. But the step was not then followed up, for it did not represent any clear determination of Congress to end the old methods; and this strange notion of refusing to make treaties with a people with whom we continue to go to war has remained on our statute-book as another of the many anomalies that mark our Indian policy. . . .

"(b) The second statute is that of March 3, 1885. It followed up timidly the logic of the law of 1871, though for only a step or two; but it marked the greatest advance yet

reached in the process of assuming the direct government of the Indians. The law provided that thereafter Indians should be punished for committing upon Indians or others any one of seven leading crimes (murder, manslaughter, assault with intent to kill, rape, arson, burglary, or larceny): if in a Territory (whether on or off a reservation), under the territorial laws and in the territorial courts; and if in a State and on a reservation, then under the same laws and in the same courts as if the act were done in a place within the exclusive jurisdiction of the United States. This is a very important statute. In principle it claims for the United States full jurisdiction over the Indians upon their reservations, whether in a State or Territory. Heretofore, the laws, for example, the statute of 1817 and the renewals of it, had excepted the acts of Indians committed upon their fellows within the Indian country. The acts of Indians against white persons or of whites against Indians had been dealt with, but the internal economy of Indian government was not invaded in its dealing or refusing to deal with the relations of members of the tribe to one another. The constitutionality, even, of such legislation as this of 1885 had been denied. Judges had been careful to avoid asserting this full power in cases where the reservation was in a State. Thus the Supreme Court of the United States, in 1845, in holding good the law of 1817, which punished (in this particular case) the act of a white man against a white man in the Indian country, among the Cherokees, said: 'Where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.' In 1834, Mr. Justice McLean had denied the power of Congress to legislate in this way for an Indian reservation in a State, while admitting it in a Territory; and in December, 1870, the judiciary committee of the Senate of the United States even went so far as to say, 'An Act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void.' But the air was at last cleared in 1886, when the Supreme Court of the United States had to deal with the indictment, under this statute, of one Indian for the murder of another Indian on a reservation in the State of California. . . .

"The existence of this right and power, and the clear and authoritative declaration of it by the Supreme Court of the United States for the first time in 1886, have brought home to the Congress of the United States and to us all, now within these recent years, a great weight of responsibility. It may have been thought possible before to deny the legal power fully to govern the Indians. It cannot be denied now. Under such circumstances, the mere neglect or refusal to act is itself action, and action of the worst kind.

"(c) The third and last of these statutes — and the last upon which I shall comment — is the General Land-in-Severalty Law (often known as the Dawes Bill). This was passed in February, 1887, within nine months of the great decision upon which I have just been remarking: the dates are May 10, 1886, and February 8, 1887. But it was pending in Congress at the time of that decision, and had long been pending there under bitter opposition. This great enactment opens the way, within a generation or two, to settle the whole Indian question. Whether it is to be regarded as a good law or a bad one, however, depends on the moderation with which it is administered. The peculiarity of it is not that its methods are new, for similar arrangements had repeatedly been made, for a score of years before, in the case of particular tribes, as the Winnebagoes in 1863, the Stockbridge Munsee Indians in 1871, the Utes in 1880, and the Omahas in 1882. But now, by a general law applicable to all reservations, the President is given power to make almost every reservation Indian outside the civilized tribes a land-owner in severalty and a citizen of the United States against his will. The right of citizenship is made to follow the ownership of land."

See also a valuable article on "The Legal Status of the Indian," by George F. Canfield, Esq., now of the Bar of the City of New York, in 15 Am. Law Rev. 21 (1881). — Ed.

DEN d. MURRAY ET AL. v. THE HOBOKEN LAND, ETC.
COMPANY.

SUPREME COURT OF THE UNITED STATES. 1855.

[18 How. 272.]¹

Mr. Van Winkle and *Mr. Wood*, for the plaintiffs. *Mr. Zabriskie*, *Mr. Gillett*, *Mr. Butler*, and *Mr. Bradley*, for the defendants.

MR. JUSTICE CURTIS delivered the opinion of the court.

This case comes before us on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout — the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the District of New Jersey, on the 1st day of June, 1839 — by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury under the Act of Congress of May 15, 1820, entitled, “An Act providing for the Better Organization of the Treasury Department.” This Act having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the District Court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiffs’ title was made, the question occurred in the Circuit Court, “whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff.” Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel.

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the Act of Congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838: that, on the 10th of November, 1838, his account, as such collector, was audited by the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of \$1,374,119 $\frac{6}{10}$, the warrant in question was issued by the solicitor of the treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the Act of Congress as authorized it, is in conflict with the Constitution of the United States.

¹ The statement of facts is omitted. — ED.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these Acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these Acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the Act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law;" and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land." in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment contain-

ing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the State constitutions, and in the ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will

This was the established way of doing business, summarily raising taxes by distress. The custom was an old one in England.

not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

By the common law, the body, lands, and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands. 3 Co. 12 b; Com. Dig., Debt, G. 2; 2 Inst. 19. But it is said that since the statute 33 Hen. VIII. c. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127.

To authorize a writ of extent, however, the debt must be matter of record in the king's exchequer. The 33 Hen. VIII. c. 39, §50, made all specialty debts due to the king of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the Crown, the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt.

This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr. 1047), though it seems that, in some cases, an order for notice might be obtained. 1 Ves. 269. Formerly, no witnesses were examined by the commission (Chitty's Prerog. 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the statute 13 Eliz. ch. 4, balances due from receivers of the revenue and all other accountants of the Crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been, from time to time, varied by legislation and usage. The different methods of accounting in ancient and modern times are described in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the pipe office, to be given in charge to the sheriffs for their levy. Price, 231.

If an accountant failed to render his accounts, a process was issued, termed a *capias nomine districtionis*, against the body, goods, and lands of the accountant. Price, 162, 233, note 3.

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied

widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts Act of 1786: "That if any constable or collector, to whom any tax or assessment shall be committed to collect, shall be remiss and negligent of his duty, in not levying and paying unto the treasurer and receiver-general such sum or sums of money as he shall from time to time have received, and as ought by him to have been paid within the respective time set and limited by the assessor's warrant, pursuant to law, the treasurer and receiver-general is hereby empowered, after the expiration of the time so set, by warrant under his hand and seal, directed to the sheriff or his deputy, to cause such sum and sums of money to be levied by distress and sale of such deficient constable or collector's estate, real and personal, returning the overplus, if any there be; and, for want of such estate, to take the body of such constable or collector, and imprison him until he shall pay the same; which warrant the sheriff or his deputy is hereby empowered and required to execute accordingly." Then follows another provision, that if the deficient sum shall not be made by the first warrant, another shall issue against the town; and if its proper authorities shall fail to take the prescribed means to raise and pay the same, a like warrant of distress shall go against the estates and bodies of the assessors of such town. Laws of Massachusetts, vol. i. p. 266. Provisions not distinguishable from these in principle may be found in the Acts of Connecticut, Revision of 1784, p. 198; of Pennsylvania, 1782, 2 Laws of Penn. 13; of South Carolina, 1788, 5 Stats. of S. C. 55; New York, 1788, 1 Jones & Varick's Laws, 34; see also 1 Henning's Stats. of Virginia, 319, 343; 12 Ibid. 562; Laws of Vermont, 1797, 1800, 340. Since the formation of the Constitution of the United States, other States have passed similar laws. See 7 Louis. An. R. 192. Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax

within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and, failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stats. at Large, 602. And again, in 1813, 3 Stats. at Large, 33, § 28, and 1815, 3 Stats. at Large, 177, § 33, the comptroller of the treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law." *Prigg v. Pennsylvania*, 16 Pet. 621; *United States v. Nourse*, 9 Pet. 8; *Randolph's Case*, 2 Brock. 447; *Nourse's Case*, 4 Cranch, C. C. R. 151; *Bullock's Case*, cited 6 Pet. 485, note.

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes, *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; *Hoke v. Henderson*, 4 Dev. N. C. Rep. 15; *Taylor v. Porter*, 4 Hill, 146; *Van Zandt v. Waddel*, 2 Yerger, 260; *State Bank v. Cooper*, Ibid. 599; *Jones's Heirs v. Perry*, 10 Ibid. 59; *Greene v. Briggs*, 1 Curtis, 311), yet, this is not universally true. There may be, and we have seen that there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the Act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United*

States v. Ferreira, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

Among the legislative powers of Congress are the powers "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and welfare of the United States; to raise and support armies; to provide and maintain a navy; and to make all laws which may be necessary and proper for carrying into execution those powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the treasury department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the Act of 1820, now in question, they have undertaken to provide summary means to compel these officers — and in case of their default, their sureties — to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the Act of 1820, do not differ in principle from those employed in England from remote antiquity — and in many of the States, so far as we know without objection — for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the

officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

It is true that in England all these proceedings were had in what is denominated the Court of Exchequer, in which Lord Coke says, 4 Inst. 115, the barons are the sovereign auditors of the kingdom. But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the Exchequer includes two distinct organizations, one of which has charge of the revenues of the Crown, and the other has long been in fact, and now is for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct, in most respects, from those of the revenue side of the Exchequer, as the proceedings of the Circuit Court of this district are from those of the treasury; and it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what was denominated the Court of Exchequer, they were judicial controversies between the king and his subjects, according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject-matter under its cognizance, it was not for the government to say that the subject-matter was not within the judicial power. That if it were not in its nature a judicial controversy, Congress could not make it such, nor give jurisdiction over it to the district courts. In short, the argument is, that if this were not, in its nature, a judicial controversy, Congress could not have conferred on the district court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy.

We cannot admit the correctness of the last position. If we were of opinion that this subject-matter cannot be the subject of a judicial controversy, and that, consequently, it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. But the previous proceedings of the executive department would not necessarily be affected thereby. They might be final, instead of being subject to judicial review.

But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted.

It assumes that the entire subject-matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of Congress to permit it to be so; and it leaves out of view the fact that the United States is a party.

It is necessary to take into view some settled rules.

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both. An instance of extra-judicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government: and the government itself, which gave the command, cannot be sued without its own consent.

At the same time there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still, Congress may provide by law, that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra-judicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit.

When, therefore, the Act of 1820 enacts, that after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extra-judicial

remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. *Foley v. Harrison*, 15 How. 433; *Burgess v. Gray*, 16 How. 48; — *v. The Minnesota Mining Company* at the present term.

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is conclusive. *Luther v. Borden*, 7 How. 1; *Doe v. Braden*, 16 How. 635.

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the Act of 1820, passed under the powers to collect and disburse the revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

It was further urged that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive

power, as was essential to enable Congress to authorize this mode of proceeding.

But it seems to us that the just inference from the entire law is, that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that Congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove they were not, in the judgment of Congress, of the highest necessity under all other circumstances; and of this necessity Congress alone is the judge.

The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the fourth article of the amendments of the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search-warrant is not made part. The process, in this case, is termed, in the Act of Congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.¹ . . .

DAVIDSON v. NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES. 1877.

[96 U. S. 97.]

ERROR to the Supreme Court of the State of Louisiana.

On the 7th of December, 1871, the petition of the city of New Orleans and the administrators thereof was filed in the Seventh District Court for the parish of Orleans, setting forth an assessment on certain real estate, made under the statutes of Louisiana, for draining the swamp lands within the parishes of Carroll and Orleans; and asking that the assessment should be homologated by the judgment of the court. The estate of John Davidson was assessed for various parcels in different places for about \$50,000. His widow and testamentary executrix appeared in that court and filed exceptions to the assessment; and the court refused the order of homologation, and set aside the entire assessment, with leave to the plaintiffs to present a new tableau.

On appeal from this decree, the Supreme Court of Louisiana reversed it, and ordered the dismissal of the oppositions, and decreed that the

¹ And so *Palmer v. McMahon*, 133 U. S. 660, 669 (1889). — Ed.

assessment-roll presented be approved and homologated, and that the approval and homologation so ordered should operate as a judgment against the property described in the assessment-roll, and also against the owner or owners thereof. Mrs. Davidson then sued out the writ of error by which this judgment is now brought here for review.

Mr. James D. Hill and *Mr. John D. McPherson*, for the plaintiff in error.

Mr. Philip Phillips, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The objections raised in the State courts to the assessment were numerous and varied, including constitutional objections to the statute under which the assessment was made, and alleged departures from the requirements of the statute itself. And although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only Federal question is, whether the judgment is not in violation of that provision of the Constitution which declares that "no State shall deprive any person of life, liberty, or property without due process of law," the argument seems to suppose that this court can correct any other error which may be found in the record.

1. It is said that the legislature had no right to organize a private corporation to do the work, and, by statute, to fix the price at which the work should be done.

2. That the price so fixed is exorbitant.

3. That there may be a surplus collected under the assessment beyond what is needed for the work, which must in that event go into the city treasury.

Can it be necessary to say, that if the work was one which the State had authority to do, and to pay for it by assessments on the property interested, that on such questions of method and detail as these the exercise of the power is not regulated or controlled by the Constitution of the United States?

Of a similar character is the objection much insisted on, that, under the statute, the assessment is actually made before, instead of after, the work is done. As a question of wisdom, — of judicious economy, — it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise; and if this is not due process of law, it ought to be.

There are other objections urged by counsel which may be referred to hereafter, but we pause here to consider a moment the clause of the Constitution relied on by plaintiff in error. It is part of sect. 1 of the Fourteenth Amendment. The section consists of two sentences. The first defines citizenship of the States and of the United States. The next reads as follows: —

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due pro-

cess of law, nor deny to any person within its jurisdiction the equal protection of the law."

The section was the subject of very full and mature consideration in *Slaughter-House Cases*, 16 Wall. 36. In those cases, an Act of the Louisiana Legislature, which had granted to a corporation created for the purpose the exclusive right to erect and maintain a building for the slaughter of live animals within the city, was assailed as being in conflict with this section. The right of the State to use a private corporation and confer upon it the necessary powers to carry into effect sanitary regulations was affirmed, and the decision is applicable to a similar objection in the case now before us. The argument of counsel and the opinion of the court in those cases were mainly directed to that part of the section which related to the privileges and immunities of citizens; and, as the court said in the opinion, the argument was not much pressed, that the statute deprived the butchers of their property without due process of law. The court held that the provision was inapplicable to the case.

The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.

The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offence; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several States, and in one shape or another have been the subject of judicial construction.

It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law," remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States.

It is easy to see that when the great barons of England wrung from

King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that "no State shall deprive any person of life, liberty, or property without due process of law," can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the Fifth Amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray's Lessee et al. v. Hoboken Land and Improvement Co.*, 18 How. 272. . . . [Here follows a statement of this case.]

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms

Court. had changed the ancient and settled definition of liberty. But the 14th amendment meant the same that the 5th meant and

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which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal government, or limitations imposed upon the States.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:—

That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Fifth Amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a circuit court of the United States, as we were in *Loan Association v. Topeka*, 20 Wall. 655. But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard v. Morgan*, 92 U. S. 480, and, in substance, repeated at the present term, in *McMillan v. Anderson*, 95 U. S. 37.

This proposition covers the present case. Before the assessment could

be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

One or two errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two.

It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States. If the Act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract.

It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, — and some highly respectable authorities are cited to support the proposition, — that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case.

As there is no error in the judgment of the Supreme Court of Louisiana, of which this court has cognizance, it is *Affirmed.*

MR. JUSTICE BRADLEY gave a concurring opinion, in which he said: "I think it [the opinion of the court] narrows the scope of inquiry as to what is due process of law more than it should do. . . . I think,

therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require."

HURTADO v. CALIFORNIA.

SUPREME COURT OF THE UNITED STATES. 1883.

[110 U. S. 516.]

THE Constitution of the State of California, adopted in 1879, in Article I., section 8, provides as follows:—

"Offences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county." . . .

[Hurtado was charged with murder, by an information filed by the District Attorney of Sacramento County in the local court, in February, 1882; on his arraignment pleaded not guilty; and was tried by jury, found guilty, and sentenced to be hanged. He filed objections to the execution of this judgment, to the effect, among other things, that the proceeding, upon information, was contrary to the Fourteenth Amendment. These objections were overruled by the local court and, on appeal, by the Supreme Court of California; and they were now brought up, on error, to the Supreme Court of the United States.]

Mr. A. L. Hart, for plaintiff in error.

Mr. John T. Cary, for defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:—

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States, which is in these words:—

“Nor shall any State deprive any person of life, liberty, or property without due process of law.”

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that “due process of law,” when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . .

It is maintained on behalf of the plaintiff in error that the phrase “due process of law” is equivalent to “law of the land,” as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in *Jones v. Robbins*, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. . . . [Here follows a consideration of this case and of certain language of Coke.]

This view of the meaning of Lord Coke is the one taken by Merriek, J., in his dissenting opinion in *Jones v. Robbins*, 8 Gray, 329, who states his conclusions in these words: “It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words ‘by the law of the land,’ in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate.” See also *State v. Starling*, 15 Rich. (S. C.) Law, 120.

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, *nisi per legale iudicium parium suorum vel per legem terre*, "But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: "The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."

This accords with what is said in *Westervelt v. Gregg*, 12 N. Y. 202, by Denio, J., p. 212: "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat. 235-244: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356: "The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray's Lessee v. Hoboken Land & Improvement Company*, 18 How. 272. . . . [Here follows a passage from this opinion.]

This, it is argued, furnishes an indispensable test of what constitutes "due process of law;" that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country: but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would

be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. . . .

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, — *suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*, 8 Rep. 115, 118 *a*, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. . . . [Here follow citations from *Munn v. Ill.*, 94 U. S. 113; *Walker v. Savinet*, 92 U. S. 90; *Kennard v. Louisiana*, 92 U. S. 480; *Davidson v. N. O.*, 96 U. S. 97.]

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that, —

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." [It then immediately adds:] "Nor be deprived of life, liberty, or property without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious

inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. . . .

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

The Supreme Court of Mississippi, in a well-considered case, — *Brown v. Lerce Commissioners*, 50 Miss. 468, — speaking of the meaning of the phrase “due process of law,” says: “The principle does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by ‘due process of law.’” . . .

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

The Constitution of Connecticut, adopted in 1818 and in force when the Fourteenth Amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall “be deprived of life, liberty, or property but by due course of law.” It falls short, therefore, of that measure of protection which it is claimed is guaranteed by Magna Charta to the right of personal liberty; notwithstanding which, it is no doubt justly said in Swift’s Digest, 17, that “this sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this State in as full extent as in any country on the globe, and in as high a degree as is consistent with the nature of civil government. No individual or body of men has a discretionary or arbitrary power to commit any person to prison; no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land.”

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and

which he says "is as ancient as the common law itself," Blackstone adds (4 Com. 305):—

"And as to those offences in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *Affirmed.*¹

[HARLAN, J., gave a dissenting opinion.]

BARBIER *v.* CONNOLLY.

SUPREME COURT OF THE UNITED STATES. 1885.

[113 U. S. 27.]

ON the 8th of April, 1884, the Board of Supervisors of the city and county of San Francisco, the legislative authority of that municipality, passed an ordinance reciting that the indiscriminate establishment of public laundries and wash-houses, where clothes and other articles were cleansed for hire, endangered the public health and the public safety, prejudiced the well-being and comfort of the community, and depreciated the value of property in their neighborhood; and then ordaining, pursuant to authority alleged to be vested in the Board under provisions of the State Constitution, and of the Act of April 19, 1856, consolidating the government of the city and county, that after its passage it should be unlawful for any person to establish, maintain, or carry on the business of a public laundry or of a public wash-house within certain designated limits of the city and county, without first having obtained a certificate, signed by the health officer of the municipality, that the premises were properly and sufficiently drained, and that all proper arrangements were made to carry on the business without injury to the sanitary condition of the neighborhood; also a certificate signed by the Board of Fire Wardens of the municipality, that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons, were in good condition, and that their use was not dangerous to the surrounding property from fire, and that all proper precautions were taken to comply with the provisions of the ordinance defining the fire limits of

¹ And so *Hallinger v. Davis*, 146 U. S. 314. See also the full discussions in *Wynehamer v. The People*, 13 N. Y. 378 (1856). — ED.

the city and county, and making regulations concerning the erection and use of buildings therein.

The ordinance required the health officer and Board of Fire Wardens, upon application of any one to open or conduct the business of a public laundry, to inspect the premises in which it was proposed to carry on the business, in order to ascertain whether they are provided with proper drainage and sanitary appliances, and whether the provisions of the fire ordinance have been complied with; and, if found satisfactory in all respects, to issue to the applicant the required certificates without charge for the services rendered. Its fourth section declared that no person owning or employed in a public laundry or a public wash-house within the prescribed limits shall wash or iron clothes between the hours of ten in the evening and six in the morning or upon any portion of Sunday; and its fifth section, that no person engaged in the laundry business within those limits should permit any one suffering from an infectious or contagious disease to lodge, sleep, or remain upon the premises. The violation of any of these several provisions was declared to be a misdemeanor, and penalties were prescribed differing in degree according to the nature of the offence. The establishing, maintaining, or carrying on the business, without obtaining the certificates, was punishable by fine of not more than \$1,000, or by imprisonment of not more than six months, or by both. Carrying on the business outside of the hours prescribed, or permitting persons with contagious diseases on the premises, was punishable by fine of not less than \$5 or more than \$50, or by imprisonment of not more than one month, or by both such fine and imprisonment.

The petitioner in the court below, the plaintiff in error here, was convicted in the Police Judge's Court of the City and County of San Francisco, under the fourth section of the ordinance, of washing and ironing clothes in a public laundry, within the prescribed limits, between the hours of ten o'clock in the evening of May 1, 1884, and six o'clock in the morning of the following day, and was sentenced to imprisonment in the county jail for five days, and was accordingly committed, in execution of the sentence, to the custody of the sheriff of the city and county, who was keeper of the county jail. That court had jurisdiction to try him for the alleged offence, if the ordinance was valid and binding. But, alleging that his arrest and imprisonment were illegal, he obtained from the Superior Court of the city and county a writ of *habeas corpus*, in obedience to which his body was brought before the court by the sheriff, who returned that he was held under the commitment of the police judge upon a conviction of a misdemeanor, the commitment and sentence being produced.

The petitioner thereupon moved for his discharge on the ground that the fourth section of the ordinance violates the Fourteenth Amendment to the Constitution of the United States, and certain sections of the Constitution of the State. The particulars stated in which such alleged violations consist were substantially these, — omitting the repetition of

the same position, — that the section discriminated between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as a necessary consequence, of the right to acquire property; that it was not within the power of the Board of Supervisors of the city and county of San Francisco; and that it was unreasonable in its requirements. The Superior Court overruled the positions and dismissed the writ, and the petitioner brought this writ of error.

Mr. A. C. Searle, Mr. H. G. Sieberst, and Mr. Alfred Clarke, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court. He recited the facts as above stated, and continued:

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the State. Our jurisdiction is confined to a consideration of the Federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. No other part of the amendment has any possible application.

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health

officer and Board of Fire Wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

In the execution of admitted powers unnecessary proceedings are often

required which are cumbersome, dilatory, and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniencies arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual.

*Judgment affirmed.*¹

IN THE MATTER OF THE APPLICATION OF JACOBS.

NEW YORK COURT OF APPEALS. 1885.

[98 N. Y. 98.]

Peter B. Olney, District Attorney, for appellant.

Wm. M. Evarts, *A. J. Dittenhoeffer*, and *Morris S. Wise*, for respondent.

EARL, J. The relator Jacobs was arrested on the 14th day of May, 1884, on a warrant issued by a police justice in the city of New York under the Act chapter 272 of the Laws of 1884, passed May 12, entitled "An Act to improve the Public Health by prohibiting the Manufacture of Cigars and Preparation of Tobacco in any form in Tenement-houses in certain Cases, and regulating the Use of Tenement-houses in certain Cases." On the evidence of the complainant he was by the justice committed for trial, and thereafter upon his petition, a justice of the Supreme Court granted a writ of *habeas corpus*, to which a return was made, and upon the hearing thereon the justice made an order dismissing the writ and remanding him to prison. From that order he appealed to the General Term of the Supreme Court, which reversed the order and discharged him from prison, on the ground that the Act under which he was arrested was unconstitutional and therefore void. The district attorney on behalf of the people then appealed to this court, and the sole question for our determination is, whether the Act of 1884 creating the offence for which the relator was arrested was a constitutional exercise of legislative power.

The facts as they appeared before the police justice were as follows: The relator at the time of his arrest lived with his wife and two children in a tenement-house in the city of New York in which three other families also lived. There were four floors in the house, and seven rooms on each floor, and each floor was occupied by one family living

¹ And so *Soon Hing v. Crowley*, 113 U. S. 703. — Ed.

independently of the others, and doing their cooking in one of the rooms so occupied. The relator at the time of his arrest was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house except the room where he was thus engaged.

These facts showed a violation of the provisions of the Act which took effect immediately upon its passage and the material portions of which are as follows: "Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement-house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein. Section 2. Any house, building, or portion thereof occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, is a tenement-house within the meaning of this Act. Section 3. The first floor of said tenement-house on which there is a store for the sale of cigars and tobacco shall be exempt from the prohibition provided in section one of this Act. Section 5. Every person who shall be found guilty of a violation of this Act, or of having caused another to commit such violation, shall be deemed guilty of a misdemeanor, and shall be punished for every offence by a fine of not less than ten dollars and not more than one hundred dollars or by imprisonment for not less than ten days and not more than six months, or both such fine and imprisonment. Section 6. This Act shall apply only to cities having over five hundred thousand inhabitants."

What does this Act attempt to do? In form, it makes it a crime for a cigar-maker in New York and Brooklyn, the only cities in the State having a population exceeding 500,000, to carry on a perfectly lawful trade in his own home. Whether he owns the tenement-house or has hired a room therein for the purpose of prosecuting his trade, he cannot manufacture therein his own tobacco into cigars for his own use or for sale, and he will become a criminal for doing that which is perfectly lawful outside of the two cities named—everywhere else, so far as we are able to learn, in the whole world. He must either abandon the trade by which he earns a livelihood for himself and family, or, if able, procure a room elsewhere, or hire himself out to one who has a room upon such terms as, under the fierce competition of trade and the inexorable laws of supply and demand, he may be able to obtain from his employer. He may choose to do his work where he can have the supervision of his family and their help, and such choice is denied him. He may choose to work for himself rather than for a taskmaster, and he is left without freedom of choice. He may desire the advantage of cheap production in consequence of his cheap rent and family help, and of this he is deprived. In the unceasing struggle for success and existence which pervades all societies of men, he may be deprived of that which will enable him to maintain his hold, and to survive. He may go to a tenement-

for 5 years and the legislature says he shall not
that house in only a certain way, that this is

house, and finding no one living, sleeping, cooking, or doing any household work upon one of the floors, hire a room upon such floor to carry on his trade, and afterward some one may commence to sleep or to do some household work upon such floor, even without his knowledge, and he at once becomes a criminal in consequence of another's act. He may go to a tenement-house, and finding but two families living therein independently, hire a room, and afterward by subdivision of the families, or a change in their mode of life, or in some other way, a fourth family begins to live therein independently, and thus he may become a criminal without the knowledge, or possibly the means of knowledge that he was violating any law. It is, therefore, plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement-house who is a cigar-maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and of some portion of his personal liberty.

The constitutional guarantee that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.

The constitutional guarantee would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein. If the legislature has the power under the Constitution to prohibit the prosecution of one lawful trade in a tenement-house, then it may prevent the prosecution of all trades therein. "Questions of power," says Chief Justice Marshall in *Brown v. State of Maryland*, 12 Wheat. 419, "do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed." Blackstone in his classification of fundamental rights says: "The third absolute right inherent in every Englishman is that of property which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution, save only by the law of the land." 1 Com. 138. In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177. Miller, J., says: "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution." In *Wynehamer v. People*, 13 N. Y. 378, 398, Comstock, J., says: "When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision

Foundation of the decision in this case is the opinion
of the dissenting judges in *Butcher's Slaughter House*
cases, and *Butcher's Union*. These authorities are

arbitrary. The legislation did have some relation
to the public health. The opinion is bad.
must the law be rationally believed to be for the public
general 630 or for a IN THE MATTER OF JACOBS. [CHAP. IV.

particular intended expressly to shield personal rights from the exercise of arbitrary power." In *People v. Otis*, 90 N. Y. 48, Andrews, J., says: "Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision."

So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. (All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection. In *Butchers' Union Company v. Crescent City Co.*, 111 U. S. 746, Field, J., says: That among the inalienable rights as proclaimed in the Declaration of Independence "is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." In the same case Bradley, J., says: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States," of which he cannot be deprived without invading his right to liberty within the meaning of the Constitution. In *Live-Stock, etc., Association v. Crescent City, etc., Company*, 1 Abb. U. S. 388, 398, the learned presiding justice says: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." In *Wynehamer v. People*, Johnson, J., says: "That a law which should make it a crime for men either to live in, or rent or sell their houses." would violate the constitutional guarantee of personal liberty. In *Bertholf v. O'Reilly*, 74 N. Y. 509, 515, Andrews, J., says: That one could "be deprived of his liberty in a constitutional sense without putting his person in confinement," and that a man's right to liberty included "the right to exercise his faculties, and to follow a lawful avocation for the support of life." . . .

class and by its action a very large number of public are restricted Is it valid?

A great or crowded city may call for legislation

CHAP. IV.]

IN THE MATTER OF JACOBS.

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These citations are sufficient to show that the police power is not without limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare, or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away.

Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an Act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the Act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the Act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law. . . .

It is plain that this is not a health law, and that it has no relation whatever to the public health. Under the guise of promoting the public health the legislature might as well have banished cigar-making from all the cities of the State, or confined it to a single city or town, or have placed under a similar ban the trade of a baker, of a tailor, of a shoemaker, of a woodcarver, or of any other of the innocuous trades carried on by artisans in their own homes. The power would have been the same, and its exercise, so far as it concerns fundamental, constitutional rights, could have been justified by the same arguments. Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one. . . .

The order should be affirmed. All concur.

Order affirmed.

PEOPLE v. MARX.

NEW YORK COURT OF APPEALS. 1885.

[99 N. Y. 377.]

F. R. Coudert and *Wheeler H. Peckham*, for appellant.*Samuel Hand*, for respondent.

RAPALLO, J. The defendant was convicted in the Court of General Sessions of the city and county of New York, of a violation of the sixth section of an Act entitled "An Act to prevent Deception in Sales of Dairy Products." Chap. 202 of the Laws of 1884. On appeal to the General Term of the Supreme Court in the first department, the conviction was affirmed, and the defendant now appeals to this court from the judgment of affirmance.

The main ground of the appeal is that the section in question is unconstitutional and void.

The section provides as follows :

"§ 6. No person shall manufacture out of any oleaginous substances, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same, or shall sell or offer to sell the same as an article of food. This provision shall not apply to pure skim-milk cheese produced from pure skim-milk." The rest of the section subjects to heavy punishments by fine and imprisonment, "whoever violates the provisions of this section."

The indictment charged the defendant with having on the 31st of October, 1884, at the city of New York, sold one pound of a certain article manufactured out of divers oleaginous substances and compounds thereof, other than those produced from unadulterated milk, to one J. M., as an article of food, the article so sold being designed to take the place of butter produced from pure unadulterated milk or cream. It is not charged that the article so sold was represented to be butter, or was sold as such, or that there was any intent to deceive or defraud, or that the article was in any respect unwholesome or deleterious, but simply that it was an article designed to take the place of butter made from pure milk or cream.

On the trial the prosecution proved the sale by the defendant of the article known as oleomargarine or oleomargarine butter. That it was sold at about half the price of ordinary dairy butter. The purchaser testified that the sale was made at a kind of factory, having on the outside a large sign "Oleomargarine." That he knew he could not get butter there, but knew that oleomargarine was sold there. And the district attorney stated that it would not be claimed that there was any fraudulent intent on the part of the defendant, but that the whole

Liberty is here used to mean use of faculties

claim on the part of the prosecution was that the sale of oleomargarine as a substitute for dairy butter was prohibited by the statute.

On the part of the defendant it was proved by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of a fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion — from three to six per cent. That it exists in no other substance than butter made from milk and it is introduced into oleomargarine butter by adding to the oleomargarine stock some milk, cream or butter, and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over one per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine were added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist who had been employed by the French government to devise a substitute for butter.

Further testimony as to the character of the article being offered, the district attorney announced that he did not propose to controvert that already given. Testimony having been given to the effect that oleomargarine butter was precisely as wholesome as dairy butter, it was, on motion of the district attorney, stricken out, and the defendant's counsel excepted. // The broad ground was taken at the trial, and boldly maintained on the argument of this appeal, that the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it is designed to take the place of dairy butter, is by this act made a crime. The result of the argument is that if, in the progress of science, a process is discovered of preparing beef tallow, lard, or any other oleaginous substance, and communicating to it a palatable flavor so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter, the ban of this statute is upon it. Whoever engages in the business of manufacturing or selling the prohibited product is guilty of a crime; the industry must be suppressed; those who could make a livelihood

Sup. v. The conception of liberty: the right to use a man's face
is in any way he may see fit. Is the act up

by it are deprived of that privilege, the capital invested in the business must be sacrificed, and such of the people of the State as cannot afford to buy dairy butter must eat their bread unbuttered.

The references which have been here made to the testimony on the trial are not with the view of instituting any comparison between the relative merits of oleomargarine and dairy butter, but rather as illustrative of the character and effect of the statute whose validity is in question. The indictment upon which the defendant was convicted does not mention oleomargarine, neither does the section (§ 6) of the statute, although the article is mentioned in other statutes, which will be referred to. All the witnesses who have testified as to the qualities of oleomargarine may be in error, still that would not change a particle the nature of the question, or the principles by which the validity of the act is to be tested. Section 6 is broad enough in its terms to embrace not only oleomargarine, but any other compound, however wholesome, valuable, or cheap, which has been or may be discovered or devised for the purpose of being used as a substitute for butter. Every such product is rigidly excluded from manufacture or sale in this State.

One of the learned judges who delivered opinions at the General Term endeavored to sustain the Act on the ground that it was intended to prohibit the sale of any artificial compound, as genuine butter or cheese made from unadulterated milk or cream. That it was that design to deceive which the law rendered criminal. If that were a correct interpretation of the Act, we should concur with the learned judge in his conclusion as to its validity, but we could not concur in his further view that such an offence was charged in the indictment, or proved upon the trial. The express concessions of the prosecuting officer are to the contrary. We do not think that section 6 is capable of the construction claimed. The prohibition is not of the manufacture or sale of an article designed as an imitation of dairy butter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese. The artificial product might be green, red, or white instead of yellow, and totally dissimilar in appearance to ordinary dairy butter, yet it might be designed as a substitute for butter, and if so, would fall within the prohibition of the statute. Simulation of butter is not the act prohibited. There are other statutory provisions fully covering that subject. Chapter 215 of the Laws of 1882, entitled "An Act to regulate the Manufacture and Sale of Oleomargarine, or any Form of Imitation Butter and Lard, or any Form of Imitation Cheese, for the Prevention of Fraud, and the Better Protection of the Public Health," by its first section prohibits the introduction of any substance into imitation butter or cheese for the purpose of imparting thereto a color resembling that of yellow butter or cheese. The second section prohibits the sale of oleomargarine or imitation butter thus colored, and the third section prohibits the sale of any article in semblance of natural cheese, not the

to help a business as against foreigners and a state
protect one of the industries of the state (which the
interests of the public welfare)?

by encouraging one industry. Could it forbid
other lines of business? Probably it could.
It is due process of law to legislate for the pub
CHAP. IV.] PEOPLE v. MARX. 635 benefit

legitimate product of the dairy, unless plainly marked "imitation cheese." Chapter 238 of the Laws of 1882 is entitled "An Act for the Protection of Dairymen, and to prevent Deception in the Sales of Butter and Cheese," and provides (§ 1) that every person who shall manufacture for sale, or offer for sale, or export any article in semblance of butter or cheese, not the legitimate product of the dairy, must distinctly and durably stamp on the side of every cheese, and on the top and side of every tub, firkin, or package, the words "oleomargarine butter," or if containing cheese, "imitation cheese," and chapter 246 of the Laws of 1882, entitled "An Act to prevent Fraud in the sale of Oleomargarine, Butterine, Suine, or other Substance not Butter," makes it a misdemeanor to sell at wholesale or retail any of the above articles representing them to be butter. These enactments seem to cover the entire subject of fraudulent imitations of butter, and of sales of other compounds as dairy products, and they are not repealed by the Act of 1884, although that Act contains an express repeal of nine other statutes, eight of which are directed against impure or adulterated dairy products, and one against the use of certain coloring matter in oleomargarine. The provisions of this last Act are covered by one of the Acts of 1882 above cited, and the provisions of the repealed Acts in relation to dairy products are covered by substituted provisions in the Act of 1884, but the statutes directed against fraudulent simulations of butter, and the sale of any such simulations as dairy butter, are left to stand. Further statutes to the same effect were enacted in 1885. Consequently, if the provisions of section 6 should be held invalid, there would still be ample protection in the statutes against fraudulent imitations of dairy butter, or sales of such imitations as genuine.

It appears to us quite clear that the object and effect of the enactment under consideration were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products, against the competition of cheaper substances, capable of being applied to the same uses, as articles of food.

The learned counsel for the respondent frankly meets this view, and claims in his points, as he did orally upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this State against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature. This we think is the real question presented in the case. Conceding that the only limits upon the legislative power of the State are those imposed by the State Constitution and that of the United States, we are called upon to determine whether or not

case decided the state law was unconstitutional

those limits are transgressed by an enactment of this description. These limitations upon legislative power are necessarily very general in their terms, but are at the same time very comprehensive. The Constitution of the State provides (art. 1, § 1), that no member of this State shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. Section 6 of article 1 provides that no person shall be deprived of life, liberty, or property, without due process of law. And the Fourteenth Amendment to the Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. *Live-Stock Ass'n v. The Crescent City, etc.* 1 Abb. [U.S.] 398; *Slaughter-House Cases*, 16 Wall. 106; *Corfield v. Coryell*, 4 Wash. C. C. 380; *Matter of Jacobs*, 98 N. Y. 98. The term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in *Bertholf v. O'Reilly*, 74 N. Y. 515, the right to liberty embraces the right of man "to exercise his faculties and to follow a lawful avocation for the support of life," and as expressed by Earl, J., in *In re Jacobs*, "one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?

Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of

the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.

Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition. We cannot doubt that such legislation is violative of the letter, as well as of the spirit of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted.

The judgment of the General Term and of the Court of Sessions should be reversed.

All concur.

*Judgment reversed.*¹

POWELL v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1887.

[127 U. S. 678.]

THE case is stated in the opinion.

Mr. D. T. Watson and *Mr. Lyman D. Gilbert*, for plaintiff in error. *Mr. W. B. Rodgers* was with them on the brief.

Mr. Wayne Mac Veagh, for defendant in error. *Mr. A. H. Wintersteen* was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a judgment of the Supreme Court of Pennsylvania, sustaining the validity of a statute of that Commonwealth relating to the manufacture and sale of what is commonly called oleomargarine butter. That judgment, the plaintiff in error contends, denies to him certain rights and privileges specially claimed under the Fourteenth Amendment to the Constitution of the United States.

By Acts of the General Assembly of Pennsylvania, one approved May 22, 1878, and entitled "An Act to prevent Deception in the Sale of Butter and Cheese," and the other approved May 24, 1883, and entitled

¹ And so *People v. Gillson*, 109 N. Y. 389 (1888). Compare *People v. Rosenberg*, 138 N. Y. 410 (1893). — ED.

"An Act for the Protection of Dairymen, and to prevent Deception in Sales of Butter and Cheese," provision was made for the stamping, branding, or marking, in a prescribed mode, manufactured articles or substances in semblance or imitation of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which oil, lard, or fat, not produced from milk or cream, entered as a component part, or into which melted butter or any oil thereof had been introduced to take the place of cream. Laws of Pennsylvania, 1878, p. 87; 1883, p. 43.

But this legislation, we presume, failed to accomplish the objects intended by the legislature. For, by a subsequent Act, approved May 21, 1885, and which took effect July 1, 1885, entitled "An Act for the Protection of the Public Health and to prevent Adulteration of Dairy Products and Fraud in the Sale thereof," Laws of Pennsylvania, 1885, p. 22, No. 25, it was provided, among other things, as follows :

"SECTION 1. That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession, with intent to sell the same, as an article of food.

"SECTION 2. Every sale of such article or substance, which is prohibited by the first section of this Act, made after this Act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts in this State to recover upon any contract for the sale of any such article or substance.

"SECTION 3. Every person, company, firm, or corporate body who shall manufacture, sell, or offer or expose for sale or have in his, her, or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this Act, shall, for every such offence, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

"SECTION 4. Every person who violates the provisions of the first section of this Act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offence, and imprisonment for one year for every subsequent offence."

The plaintiff in error was indicted, under the last statute, in the

Court of Quarter Sessions of the Peace in Dauphin County, Pennsylvania. The charge in the first count of the indictment is, that he unlawfully sold, "as an article of food, two cases, containing five pounds each, of an article designed to take the place of butter produced from pure, unadulterated milk or cream from milk, the said article so sold, as aforesaid, being an article manufactured out of certain oleaginous substances and compounds of the same other than that produced from unadulterated milk or cream from milk, and said article so sold, as aforesaid, being an imitation butter." In the second count the charge is that he unlawfully had in his possession, "with intent to sell the same, as an article of food, a quantity, *viz.*, one hundred pounds, of imitation butter, designed to take the place of butter produced from pure, unadulterated milk or cream from the same, manufactured out of certain oleaginous substances, or compounds of the same other than that produced from milk or cream from the same."

It was agreed, for the purposes of the trial, that the defendant, on July 10, 1885, in the city of Harrisburg, sold to the prosecuting witness, as an article of food, two original packages of the kind described in the first count; that such packages were sold and bought as butterine, and not as butter produced from pure, unadulterated milk or cream from unadulterated milk; and that each of said packages was, at the time of sale, marked with the words, "Oleomargarine Butter," upon the lid and side in a straight line, in Roman letters half an inch long.

It was also agreed that the defendant had in his possession one hundred pounds of the same article, with intent to sell it as an article of food.

This was the case made by the Commonwealth.

The defendant then offered to prove by Prof. Hugo Blanck that he saw manufactured the article sold to the prosecuting witness; that it was made from pure animal fats; that the process of manufacture was clean and wholesome, the article containing the same elements as dairy butter, the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as butterine; that this butterine existed in dairy butter in the proportion of from three to seven per cent, and in the manufactured article in a smaller proportion, and was increased in the latter by the introduction of milk and cream; that this having been done, the article contained all the elements of butter produced from pure unadulterated milk or cream from the same except that the percentage of butterine was slightly smaller; that the only effect of butterine was to give flavor to the butter and that it had nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article were substantially identical with those produced from milk or cream; and that the article sold to the prosecuting witness was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk or cream from unadulterated milk.

The defendant also offered to prove that he was engaged in the grocery and provision business in the city of Harrisburg, and that the

*power. Ct. says that they can not interfere. If the legislature thinks it is injurious to the public health then this may not be an un-
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article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relating to the manufacture and sale of said article, and so sold by him; that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and, if prevented from continuing it, the value of his property employed therein would be entirely lost, and he be deprived of the means of livelihood.

To each offer the Commonwealth objected upon the ground that the evidence proposed to be introduced was immaterial and irrelevant.

The purpose of these offers of proof was avowed to be: (1) To show that the article sold was a new invention, not an adulteration of dairy products, nor injurious to the public health, but wholesome and nutritious as an article of food, and that its manufacture and sale were in conformity to the Acts of May 22, 1878, and May 24, 1883. (2) To show that the statute upon which the prosecution was founded, was unconstitutional, as not a lawful exercise of police power, and, also, because it deprived the defendant of the lawful use "of his property, liberty, and faculties, and destroys his property without making compensation."

The court sustained the objection to each offer, and excluded the evidence. An exception to that ruling was duly taken by the defendant.

A verdict of guilty having been returned, and motions in arrest of judgment and for a new trial having been overruled, the defendant was adjudged to pay a fine of one hundred dollars and costs of prosecution, or give bail to pay the same in ten days, and be in custody until the judgment was performed. That judgment was affirmed by the Supreme Court of the State. 114 Penn. St. 265.

This case, in its important aspects, is governed by the principles announced in *Mugler v. Kansas*, 123 U. S. 623.

It is immaterial to inquire whether the acts with which the defendant is charged were authorized by the statute of May 22, 1878, or by that of May 24, 1883. The present prosecution is founded upon the statute of May 21, 1885; and if that statute be not in conflict with the Constitution of the United States, the judgment of the Supreme Court of Pennsylvania must be affirmed.

It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws: rights which are secured by the Fourteenth Amendment to the Constitution of the United States.

It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving

the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler v. Kansas*, 123 U. S. 663; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 751; *Barbier v. Connolly*, 113 U. S. 27; *Yick Wo v. Hopkins*, 118 U. S. 356.

The question, therefore, is whether the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health.

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. *Mugler v. Kansas*, 123 U. S. 623, 661. The court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 700, 718, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also,

Fletcher v. Peck, 6 Cranch, 87, 128; *Dartmouth College v. Woodward*, 4 Wheat. 518, 625; *Livingston v. Darlington*, 101 U. S. 407.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;" yet, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." *Yick Wo v. Hopkins*, 118 U. S. 370. The case before us belongs to the latter class. The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued, in behalf of the defendant, that if the statute in question

is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between co-ordinate branches of the government, whether State or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the State legislature, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land.

The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, 519.

It is also contended that the Act of May 21, 1885, is in conflict with the Fourteenth Amendment in that it deprives the defendant of his property without that compensation required by law. This contention is without merit, as was held in *Mugler v. Kansas*.

Upon the whole case, we are of opinion that there is no error in the judgment, and it is, therefore, *Affirmed*.¹

[FIELD, J. gave a dissenting opinion in the course of which he said: "Two questions are thus distinctly presented: first, whether a State can lawfully prohibit the manufacture of a healthy and nutritious article of food designed to take the place of butter, out of any oleaginous substance, or compound of the same, other than that produced from pure milk or cream, and its sale when manufactured? and, second, whether a State can, without compensation to the owner, prohibit the sale of an article of food, in itself healthy and nutritious, which has been manufactured in accordance with its laws?"

"These questions are not presented in the opinion of the court as nakedly and broadly as here stated, but they nevertheless truly indicate the precise points involved, and nothing else. . . .

¹ See *Weideman v. The State*, 56 N. W. Rep. 688 (Minn. 1893). — ED.

"It is the clause [of the Fourteenth Amendment] declaring that no State shall 'deprive any person of life, liberty, or property without due process of law,' which applies to the present case. This provision is found in the constitutions of nearly all the States, and was designed to prevent the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property. As I said on a former occasion, it means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. It has always been supposed to secure to every person the essential conditions for the pursuit of happiness, and is therefore not to be construed in a narrow or restricted sense. *Ex parte Virginia*, 100 U. S. 339, 366.

"By 'liberty,' as thus used, is meant something more than freedom from physical restraint or imprisonment. It means freedom not merely to go wherever one may choose, but to do such acts as he may judge best for his interest not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment. As said by the Court of Appeals of New York, in *People v. Marx*, 'the term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare,' 99 N. Y. 377, 386; and again, *In the Matter of Jacobs*: 'Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties, in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation.' 98 N. Y. 98.

"With the gift of life there necessarily goes to every one the right to do all such acts, and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men. The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no State can give and no State can take away except in punishment for crime. It is involved in the right to pursue one's happiness. This doctrine is happily expressed and illustrated in *People v. Marx*, cited above, where the precise question here was presented." ¹

¹ "Our American constitutions . . . are historical instruments, the possessions of a people with a legal history beginning, not with the Declaration of Independence, but with that of their English brethren. They are not the beginning, but the end; for

they represent the last stage in a series of changes, the great landmarks of which are the Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights.

"It is obvious, therefore, that one who seeks to put a true construction on any part of our constitutions must have a constant eye to its history, and this is particularly the case when one is dealing with a clause in a bill of rights, because an American bill of rights is a collection of words and clauses, many of which have had a definite meaning for centuries. It may be true that if our constitutions are to meet all the requirements of a constantly advancing civilization, they must receive a broad and progressive interpretation. It is also true that upon no legal principle can an interpretation be supported, which ignores the meaning universally accorded to a word or clause for centuries, and the meaning which must, therefore, have been intended by those who inserted it in the Constitution. It is perhaps well to bear this in mind at a time when there is a manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties, — at a time, that is to say, when there is danger of loose and unhistorical constitutional interpretation. . . .

"It may, however, be contended that although the term 'liberty' is not used in the clauses under discussion in its broadest sense to include all the rights one has in a body politic, it does include other great and important rights besides that of personal liberty, as, for example, religious liberty, liberty of speech and of press, liberty to bear arms, of petition and discussion, liberty to obtain justice in the courts, and many others, all of which are to-day regarded as fundamental rights in this country.¹ It may be argued, in other words, that the term 'liberty' is a broader one than the terms used in Magna Charta, and may well be interpreted to include other rights besides that of personal freedom, for the reason that it was probably intended so to do by the framers of our constitutions. There are several answers to this argument. In the first place, the clauses in our American constitutions are, as we have seen, mere copies of the thirty-ninth article of Magna Charta, which knows nothing of such rights as the above. In the second place, the term 'liberty,' while it was not used in the thirty-ninth article, was used in its present connection with the terms 'life' and 'property' long before the framing of our American constitutions, and when so used meant simply personal liberty. It would, therefore, naturally be used by the framers of our constitutions in that sense. To establish this it is only necessary to refer to Blackstone. In one place Blackstone remarks: 'The Great Charter protected every individual of the nation in the free enjoyment of his life, liberty, and property unless declared to be forfeited by the judgment of his peers or the law of the land,' referring, of course, to the thirty-ninth article. In another place he discusses the subject more at length, and after defining the absolute rights of individuals, 'which are usually called their liberties,' to be 'those rights which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it,' he goes on to enumerate them: 'These rights may be reduced to three principal or primary articles: the right of personal security' (under which he includes life, limb, health, and reputation, the same rights which Coke and other commentators on the thirty-ninth article include under the terms 'aliquo modo destruat,' and which may fairly be included under the term 'life' in our constitutions), 'the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free will but by an infringement of one or the other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.' 1 Bl. Com's, chapter on 'Absolute Rights

¹ See Judge Cooley's discussion of the Fourteenth Amendment in the Appendix of his edition of Story on the Constitution. See also his discussion of "Civil Rights" in the "Principles of Constitutional Law."

IN *Missouri Pac. R'y Co. v. Mackey*, 127 U. S. 205 (1888). In holding valid a law of the State of Kansas which made railroad companies responsible to its servants for injuries from the negligence or misconduct of their fellow-servants, MR. JUSTICE FIELD, for the court, said: "The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does

of Persons.' Blackstone defines personal liberty to be the 'power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law,' and he observes that it is perhaps the most important of all civil rights. He means by personal liberty simply freedom from restraint of the person. It is instructive to note that Blackstone, in discussing each 'absolute' right, points out that it is declared and secured by the famous article of the Great Charter. He cites the words 'nullus liber homo aliquo modo destruat' as the constitutional security for the right of life or personal security; the words 'capiatur vel imprisonetur' for the right of personal liberty, and the words 'dissaisiatur de libero tenemento' for the right of private property. It is evident, therefore, that his classification of fundamental rights under the terms 'life,' 'liberty,' and 'property,' like that of all other commentators, is derived from the thirty-ninth article. It is evident, also, that he had no conception of religious liberty, liberty of press and speech, or political liberty (meaning thereby the right to take part in the government, *e.g.*, the right to vote) as absolute rights of individuals. They are not mentioned in his discussion of the subject. He does, indeed, name certain other important individual rights besides those of life, personal freedom, and property, such as the right of petition, of securing justice in the courts, and of bearing arms; but he says that these 'serve principally as networks or barriers to protect and maintain inviolate the three great and primary rights.'

"In 'Care's English Liberties,' a collection of important English charters which had a wide circulation in the American colonies, the fifth edition of which was published in Boston in 1721, we find the same classification of rights in the same terms, and in every case the term 'liberty' is explained to mean freedom of the person from restraint. For example, in his comment on the Habeas Corpus Act, the author says: 'There are three things which the law of England (which is a law of mercy) principally regards and taketh care of, *viz.*, life, liberty, and estate. Next to a man's life the nearest thing that concerns him is freedom of his person; for indeed, what is imprisonment but a kind of civil death? Therefore, saith Fortescue, cap. 42, the laws of England do, in all cases, favor liberty. The writ of *habeas corpus* is a remedy given by the common law, for such as were unlawfully detained in custody, to procure their liberty.' Care's English Liberties (Ed. 1721) p. 185.

"Chancellor Kent made precisely the same enumeration of fundamental rights, with religious liberty added as a distinct and separate right. Kent's Com'n, vol. 2, chap. 1. 'There is no suggestion of its being included in the clauses in question.' — *Meaning of the term "Liberty" in Federal and State Constitutions*, by CHARLES E. SHATTUCK, 4 Harv. Law Rev. 365. — Ed.

with special expropriations does not make it bad It is not fatal.

not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. *It is conceded that corporations are persons within the meaning of the amendment.* *Santa Clara County v. Southern Pacific Railroad Company*, 118 U. S. 394; *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U. S. 187. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories. See *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, 523; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703.

Judgment affirmed."

SPENCER v. MERCHANT.

SUPREME COURT OF THE UNITED STATES. 1888.

[125 U. S. 345.]¹

This case was submitted to the general term in Kings County of the Supreme Court of the State of New York under § 1279 of the Code of Civil Procedure, without process, upon an agreed statement of facts signed by the parties, the substance of which, and of the statutes therein referred to, was as follows: . . . [The plaintiff agreed to sell certain

¹ The statement of facts is shortened. — Ed.

lying within certain distance on either side of the street as in the judgment of the commissioners would be benefitted by the improvement. The Ct. of Appeals declared the assessment void because the statute provided no

In 1869 the Legislature of N.Y. passed an act providing for the grading of streets and for the laying of a sewer upon the lands

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Notes to 125

portunity to be heard in regard to the assessment, Part
of the sums so assessed had been paid. By a stat

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land to the defendant, and to give a deed with a covenant against all
incumbrances. The defendant paid a part of the consideration, and in
examining the title found an unpaid assessment on the land for the
opening of a street.]

The case stated by the parties, after setting forth the foregoing facts,
continued and concluded as follows:

"The plaintiff claims that said assessment of 1881 in question is not
a lien or cloud on the title to said premises; and the defendant refuses
to pay the balance of said consideration until the plaintiff allows it to
be deducted from the consideration money or pays the same, neither
of which is the plaintiff willing to do; and the plaintiff also claims that
the statute of 1881, c. 689, is unconstitutional, and therefore void, for
the reason that it is an attempt made by the legislature of this State
to validate a void assessment (and to do the same without giving the
property-holders an opportunity to be heard as to the total amount of
the assessment, only providing for a hearing on the apportionment),
which was levied upon said premises under and pursuant to c. 217 of
the laws of 1869, as amended by c. 619 of the laws of 1870; and that
the statute of 1881 is clearly void for the further reasons that the defect
in the former assessment was jurisdictional, and it has been so declared
and decided by the Court of Appeals in the case of *Stuart v. Palmer*,
74 N. Y. 183, and is special and invidious, and unjustly and illegally
apportioned upon certain individuals without reference to a uniform
standard, and is an arbitrary exaction, and is levied on an individual
or individuals to the exclusion of others in the same district. The
defendant doubts the said claim of the plaintiff. The question sub-
mitted to the court upon this case is as follows:

"Is the assessment levied on the property in 1881 in question a good
and valid lien or cloud on said property?"

"If this question is answered in the affirmative, then judgment is to
be rendered in favor of the defendant and against the plaintiff, requir-
ing the plaintiff to pay said assessment to deliver a deed according to
contract.

"If it be answered in the negative, then judgment is to be rendered
in favor of the plaintiff, requiring the defendant to take title to said
premises in accordance with the contract above mentioned, without the
plaintiff paying said assessment or tax, and without deducting the same
out of the consideration money."

The Supreme Court of New York gave judgment for the defendant,
and the plaintiff appealed to the Court of Appeals, which affirmed the
judgment and remitted the case to the Supreme Court. 100 N. Y. 585.
The plaintiff sued out this writ of error, and assigned for error that it
appeared by the record that both those courts held that the statute of
1881, c. 689, and the proceedings under it were constitutional and
valid, "whereas the said courts should have decided that the said
statute and the proceedings thereunder were in violation of the Consti-
tution of the United States and were void, for the reason that they

assessment was levied upon plf's. lot. Was it valid?
It is contended that the act of 1881 was unconstitutional
and void because it was an attempt to validate

that the legislature may determine who shall pay and what sums. Even if there had been no hearing in court at all this court would probably have

v. *Nichol*, 8 Wall. 41, 56; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 579.

The jurisdiction of this court, as is well understood, does not extend to a review of the judgment of the State court, so far as it depended upon the Constitution of the State. *Provident Institution for Savings v. Jersey City*, 113 U. S. 506, 514. Yet, as the words of the two constitutions are alike in this respect, the decisions of the highest court of the State upon the effect of these words are entitled to great weight. The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by Judge Finch in delivering the opinion of the Court of Appeals, as follows:

“The Act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. *Litchfield v. Vernon*, 41 N. Y. 123, 141; *People v. Brooklyn*, 4 N. Y. 427; *People v. Flagg*, 46 N. Y. 405; *Horn v. New Lots*, 83 N. Y. 100; *Cooley on Taxation*, 450. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the Act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, *viz.*, the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that Act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power.

That power of taxation is unlimited, except that it must be exercised for public purposes. *Weismser v. Douglas*, 64 N. Y. 91. Certainly if the Acts of 1869 and 1870 had never been passed, but the improvement of Atlantic Avenue had been ordered, the legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. In *Re Van Antwerp*, 56 N. Y. 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property-owners. The legislature made a reassessment, imposing two thirds of the expense upon a benefited district and one third upon the city at large. The Act was held valid as a new assessment and not an effort to validate a void one.

“These views furnish also an answer to the objection that the only hearing given to the land-owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the Act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. (The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction.) It may err, but the courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the Act under which alone an apportionment could be made, and that objection failing, it opened the only other possible questions, of the mode and amounts of the apportionment itself. We think the Act was constitutional.” 100 N. Y. 587-589.

The general principles, upon which that judgment rests, have been affirmed by the decisions of this court.

“The power to tax belongs exclusively to the legislative branch of the government. *United States v. New Orleans*, 98 U. S. 381, 392; *Meri-*

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wether v. Garrett, 102 U. S. 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." *Teazie Bank v. Fenno*, 8 Wall. 533, 548; *McCulloch v. Maryland*, 4 Wheat. 316, 428; *Providence Bank v. Billings*, 4 Pet. 514, 563. See also *Kirtland v. Hotchkiss*, 100 U. S. 491, 497. Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a State court cannot inquire. *Kelly v. Pittsburgh*, 104 U. S. 78, 80.

The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard v. Presbury*, 14 Wall. 676; *Davidson v. New Orleans*, 96 U. S. 97; *Mobile County v. Kimball*, 102 U. S. 691, 703, 704; *Hugar v. Reclamation District*, 111 U. S. 701. If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, and *Hugar v. Reclamation District*, above cited.

In *Davidson v. New Orleans*, it was held that if the work was one which the State had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the Fourteenth Amendment to the Constitution, upon which this court could review the decision of the State court. 96 U. S. 100, 106.

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In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax,

what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction.

In § 4 of the statute of 1869, the assessment under which was held void in *Stuart v. Palmer*, 74 N. Y. 183, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within three hundred feet, on either side of the street, were actually benefited, was delegated to commissioners.

But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled.

It is objected to the validity of the new assessment, that it included interest upon the unpaid part of the old assessment, and a proportionate part of the expense of levying that assessment. But, as to these items, the case does not substantially differ from what it would have been if a sum equal to the whole of the original assessment, including the expense of levying it, and adding the interest, had been ordered by the statute of 1881 to be levied upon all the lands within the district, allowing to each owner, who had already paid his share of the original assessment, a credit for the sum so paid by him, with interest from the time of payment.

Judgment affirmed.

[The dissenting opinion of MATTHEWS, J. (for himself and HARLAN, J.), is omitted.]

the legislature of Cal. passed
an act authorizing the
widening of Dupont St.

LENT v. TILLSON.

D. F. Pro SUPREME COURT OF THE UNITED STATES. 1890.

in was made [140 U. S. 316.]

the issue THE case, as stated by the court, was as follows: —

This suit, which was commenced April 5, 1879, arises out of an Act of the Legislature of California, approved March 23, 1876, entitled "An Act to authorize the widening of Dupont Street in the City of San Francisco." An assessment was made to meet the cost incurred in its execution. Provision was made in the Act to issue and sell bonds to meet such cost in the first instance, and for the levy of an annual tax on the lands benefited, in proportion to benefits, to pay the interest on the bonds, and to create a sinking fund for the payment of the principal debt. Bonds, dated January 1, 1876, to the amount of one million dollars, were issued in the name of the city and county of San Francisco, and made payable to the holder in gold coin of the United States, twenty years after date, with interest, payable half yearly, at the rate of seven per cent per annum. The bonds recited that they were issued under the above Act, were to be paid out of the fund raised by taxation as therein provided, and were taken by the holder subject to the conditions expressed in its 22d section to be hereafter referred to. They were signed by the mayor, auditor, and county surveyor, and attested by the official seal of the city and county. The plaintiffs in error, who were the plaintiffs below, being owners of lots or parcels of land within the district subject to the assessment, and claiming that the statute was unconstitutional and void, brought this suit to obtain a decree perpetually enjoining the defendant in error, tax collector of the city and county of San Francisco, from selling their property under the assessment. Holders of the bonds to a large amount intervened and were made defendants. The court of original jurisdiction — the Superior Court of the city and county of San Francisco — rendered a decree giving the relief asked. Upon appeal to the Supreme Court of California that decree was reversed and the cause remanded with directions to dissolve the injunction and dismiss the complaint.

The statute in question contains many provisions. . . . [Here follows a long statement of these provisions.]

Mr. Joseph H. Choate, for plaintiffs in error. Mr. John Garber and Mr. T. B. Bishop also filed a brief for same.

Mr. A. H. Garland (with whom were Mr. John Mullan and Mr. H. J. May on the brief), for defendant in error.

MR. JUSTICE HARLAN, after making the above statement, delivered the opinion of the court.

The Chief Justice of the Supreme Court of California, under its order, made his certificate to the effect that in this suit and appeal there was drawn in question the validity of the above Act of March 23, 1876, and the injunction. Upon error to the Supreme Ct. U. S. held. the provisions of the statute were in substantial conformity with the requirements of due process.

Constitution of the U.S. and yet the unsuccessful
litigant has no right to carry his case to the Sup.

6 N.Y. CHAP. IV.]

LENT v. TILLSON.

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the authority exercised and the proceedings taken under it, on the ground that the statute and said authority and proceedings were repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the decision of that court was in favor of their validity.

The provisions of the statute, to which we have referred, sufficiently indicate its scope and effect, and enable us (without referring to others that relate to matters of mere detail) to determine whether or not the Act, upon its face or by its necessary operation, is repugnant to that clause of the Constitution declaring that no State shall deprive any person of property without due process of law.

We have seen that the statute defined the district benefited by the widening of Dupont Street, and upon which the assessment to meet the cost of the work was to be imposed; made it a condition precedent to the proposed improvement that it should be declared by resolution or order of the Board of Supervisors of the city and county to be expedient; directed that, after the passage of such a resolution or order, the Dupont Street Commissioners should publish, for not less than ten days, in two daily papers in San Francisco, a notice informing property owners along the line of the street of its organization, and inviting all persons interested in property sought to be taken, or that would be injured by the widening of that street, to present descriptions of their respective lots, and a statement in writing of their interest in them; allowed the majority in value of owners of property within the district embracing the lands of the plaintiffs, at any time within thirty days after the last publication of the above notice, by written protest filed with the Board of Commissioners, to defeat altogether the proposed widening of Dupont Street; required the board to prepare a written report showing the description and actual cash value of the several lots and subdivisions of land and buildings included in the land proposed to be taken for the widening of the street, the value and damage determined upon for the same respectively and the amount in which, according to its judgment, each lot had been or would be benefited by reason of the widening of the street, relatively to the benefits accruing to other lots of land within the designated district; and directed such report, as soon as completed, to be left at the office of the board daily, during ordinary business hours, for the free inspection of all persons interested, and notice of the same being open for inspection at such time and place published by the board daily, for twenty days, in two daily newspapers printed and published in the city and county.

But this was not all. For any person interested, and who felt himself aggrieved by the action or determination of the board, as indicated by its report, was permitted, at any time within the above thirty days, to apply by petition to the county court of the city and county, showing his interest in the proceedings of the Board of Commissioners, and his objections thereto, for an order that would bring before that court the report of the board, together with such pertinent documents or data as were in its custody, and were used in preparing its report. It was made

The board was to make written report showing the amount each lot would be benefitted and its assessment. If after this any one felt aggrieved he could petition the county court for a

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the duty of the party filing the petition to serve, on the same day, a copy thereof on at least one of the members of the Board of Commissioners, who were at liberty to appear by counsel, or otherwise, and make answer to it. The court was also empowered to hear the petition, and set it down for hearing within ten days from its being filed. Provision was made for the taking of testimony upon the hearing, and the court was authorized to use its process to compel the attendance of witnesses and the production of books, papers, or maps in the custody of the board, or otherwise. The discretion given to the court, after hearing and considering the application, to allow or to deny the order prayed for was, of course, to be exercised judicially, according to the showing made by the petitioners. And that complete justice might be done, the court was invested with power, not simply to approve and confirm the report of the board, but to refer it back with directions to alter or modify the same in the particulars specified by the court. Until such alterations and modifications were made, the court was under no duty to approve or confirm the report; and until it was approved and confirmed, the board was without authority to proceed at all in the work committed to it by the statute.

Were not these provisions in substantial conformity with the requirements of "due process of law" as recognized in the decisions of this court? In *Davidson v. New Orleans*, 96 U. S. 97, 104, it was said that "whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." So in *Hagar v. Reclamation District*, 111 U. S. 701, 708: "Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But, where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. . . . As stated by Mr. Justice Bradley in his concurring opinion in *Davidson v. New Orleans*, 'in judging what is due process of law, respect must be had to the cause and object of the taking, whether the taxing power, the power of eminent domain or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due

the court to approve the report or to refer it back to the
rd for modifications in the particulars specified.

process of law.” Of the different kinds of taxes which a State may impose, and of which from their nature no notice can be given, the court, in that case, enumerates poll taxes, licenses (not dependent upon the extent of business) and specific taxes on things, persons, or occupations. p. 709.

These principles were reaffirmed in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, and in *Spencer v. Merchant*, 125 U. S. 345, 355, in the latter of which cases it was said that “the legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading, or repairing [and, equally, the widening] of a street, to be assessed upon the owners of lands benefited thereby;” and that, “the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;” also, that, “if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.”

Tested by these principles, the statute providing for the widening of Dupont Street cannot be held to be repugnant to the constitutional requirement of due process of law. The notice by publication to all who owned property liable to be assessed for the cost of that improvement was appropriate to the nature of the case, and was reasonable in respect to the length of time prescribed for the publication. And ample opportunity was given to all persons interested to test in a court of competent jurisdiction the fairness and legality of any assessment proposed to be made upon their property for the purposes indicated by the statute. That court had power to require such alterations or modifications of the report of the Board of Commissioners as justice demanded. It was not bound to approve any report that did not conform to its judgment as to what was right; and without such confirmation the board could not proceed in the execution of the work contemplated by the legislature.

If we had any doubt of the correctness of these views, we should accept the interpretation which the highest court of the State places upon the statute. When the inquiry is whether a State enactment under which property is proposed to be taken for a public purpose accords full opportunity to the owner, at some stage of the proceedings involving his property, to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of the State will give effect to such enactment as interpreted by the highest court of that State. The Supreme Court of California, speaking by Mr. Justice Temple, in this case, has said: “We are not considering here a statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard, without which the law would be void. To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding

farceful. And I must confess, it seems to me, it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section [§ 8], but it would not have provided so elaborately for a thorough investigation for grievances if it were not intended that redress should be awarded. The statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the court may alter and modify. And it seems that such action is to be based upon the hearing provided for. The word 'discretion' is used in various meanings, but here, evidently, it was intended to submit the whole matter to the sound judgment of the court to be exercised according to the rules of law." 72 California, 404, 421.

It is said that the county court was without power to adjudge the statute to be unconstitutional, and had no discretion, except to confirm the report, or to require it to be altered or modified. We do not perceive that this is a material inquiry, so long as the statute is not repugnant to the Constitution. But we do not admit that the county court was without power to hold it to be unconstitutional and void — if such was its view — and to decline, upon that ground alone, to confirm any report that the Board of Commissioners might have filed. The judge or judges of that court were obliged, by their oath of office, and in fidelity to the supreme law of the land, to refuse to give effect to any statute that was repugnant to that law, anything in the statute or the Constitution of the State to the contrary notwithstanding. Upon this subject, as well as in respect to the power of the county court to consider objections of every nature that might be made to the confirmation of any report from the Board of County Commissioners, the Supreme Court of the State said: "The statute does not expressly authorize the court to pass upon the validity of the Act, or whether the Board of Supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the court to act at all. It may be that the court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a constitutional court, invested with jurisdiction by the constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard." Again: "The statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the board as shown in the report. As all their determinations which could affect any person were required to appear in the report, this would seem to include all possible objections. The determination, for instance, might have been objected to, because, the Act being invalid or the notices not having been given, the board had no right to proceed to act at all. If this contention were sustained, the result would have been that the court would not have confirmed the report, and the proceedings would have

ended without fixing a charge upon the property of plaintiffs. They could have complained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much, or for any misconduct of the commissioners which could affect them, or that the cost exceeded the estimated benefits, and it does not seem to me that the court would have found any difficulty in granting relief." 72 California, 404, 422.

It is contended, however, that the Act was so administered as to result in depriving the plaintiffs of their property without due process of law. This contention is material only so far as it involves the inquiry as to whether the tribunals charged by the statute with the execution of its provisions acquired jurisdiction to proceed in respect to the lots or lands in question and the owners thereof. Jurisdiction was, of course, essential before the plaintiff's property could have been burdened with this assessment. But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court, in its re-examination of the judgment of the State court, upon writ of error, to hold that the State had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont Street, or whether the Board of Supervisors should have so declared, or whether the Board of Commissioners properly apportioned the costs of the work or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are, none of them, issues presenting Federal questions, and the judgment of the State court, upon them, cannot be reviewed here.

Upon the issue as to whether the Board of Commissioners and the county court acquired jurisdiction to proceed in the execution of the statute, the evidence is full and satisfactory. . . .

It is contended that the notices required by the different sections of the Act to be published for a designated number of days were not so published. This contention rests, principally, upon the ground that the notices, on some of the days, appeared in a "Supplement" of some of the newspapers, and not in the body of the paper where reading matter was usually found. There is no force in this objection, and it does not deserve serious consideration.

Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the Board of Commissioners, was himself the owner of a lot on Dupont Street, and, for that reason, was incompetent to act as one of the Board of Street Commissioners; that

some of the alterations and modifications of the report of the commissioners made upon the hearing in the county court, of the petitions filed by different parties were so made under private arrangements between the commissioners and those parties, of which other property owners along Dupont Street had no notice, and by which such owners were injuriously affected; that the Board of Commissioners selected experts to "assist" it in estimating the damages for property taken and injured by the proposed improvement and the benefits accruing therefrom, and that the report of those experts was accepted by the commissioners, without themselves making or attempting to make an appraisement of damages or an assessment of benefits under the statute; and that such appraisement and assessment were not in fact correct, fair, or just, but were fraudulent. In respect to all these and like objections, it is sufficient to say that they do not necessarily involve any question of a Federal nature, and, so far as this court is concerned, are concluded by the decision of the Supreme Court of California.

We are of opinion, upon the whole case, that the Supreme Court of California correctly held that the plaintiffs had not been, or were not about to be, deprived of their property, in violation of the Constitution of the United States.

Decree affirmed.

MR. JUSTICE FIELD. I dissent.

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that the R. R. Co. was making

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CHICAGO, ETC. RAILWAY COMPANY v. MINNESOTA.

SUPREME COURT OF THE UNITED STATES. 1889.

[134 U. S. 418.]¹

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This was a writ of error to review a judgment of the Supreme Court of the State of Minnesota, awarding a writ of *mandamus* against the Chicago, Milwaukee & St. Paul Railway Company.

The case arose on proceedings taken by the Railroad and Warehouse Commission of the State of Minnesota, under an Act of the Legislature of that State, approved March 7, 1887. General Laws of 1887, c. 10, entitled "An Act to regulate Common Carriers, and creating the Railroad and Warehouse Commission of the State of Minnesota, and defining the Duties of such Commission in Relation to Common Carriers."

The Act is set forth in full in the margin [of 134 U. S. Reports at pp. 418-434].

The ninth section of that Act creates a commission to be known as the "Railroad and Warehouse Commission of the State of Minnesota," to consist of three persons to be appointed by the Governor by and with the advice and consent of the Senate.

The first section of the Act declares that its provisions shall apply

in acting strict
in conformity with a state statute declared that
rate should henceforth be 2½¢. per gallon for
the transportation of milk bet. certain places

¹ The statement of facts is shortened. — Ed.

to any common carrier "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the State of Minnesota."

The second section declares "that all charges made by any common carrier, subject to the provisions of this Act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful."

The eighth section provides that every common carrier subject to the provisions of the Act shall print and keep for public inspection schedules of the charges which it has established for the transportation of property; that it shall make no change therein except after ten days' public notice, plainly stating the changes proposed to be made, and the time when they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that so established and published, for transporting property; that it shall file copies of its schedules with the commission, and shall notify such commission of all changes proposed to be made; that in case the commission shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," to which end the commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that in case the carrier shall neglect for ten days after such notice to adopt such tariff of charges as the commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the commission; and that, if any carrier subject to the provisions of the Act shall neglect to publish or file its schedules of charges, or to carry out such recommendation made and published by the commission, it shall be subject to a writ of mandamus "to be issued by any judge of the Supreme Court or of any of the district courts" of the State, on application of the commission, to compel compliance with the requirements of section 8 and with the recommendation of the commission, and a failure to comply with the requirements of the mandamus shall be punishable as and for contempt, and the commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the State until it shall

the commission. Error to U. S. Sup. Ct.

It is held, adopting the construction of the statute which the State Supreme Ct. made, the legislative act deprives

have complied with the requirements of section 8 and with the recommendation of the commission, and for any wilful violation or failure to comply with such requirements or such recommendation of the commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, as may be just.

On the 22d of June, 1887, The Boards-of-Trade Union of Farmington, Northfield, Faribault, and Owatonna, in Minnesota, filed with the commission a petition in writing, complaining that the Chicago, Milwaukee & St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad, for carriage or shipment from Owatonna, Faribault, Dundas, Northfield, and Farmington, to the cities of St. Paul and Minneapolis, all of those places being within the State of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield, and Farmington to St. Paul and Minneapolis, which were unequal and unreasonable, in that it charged four cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and three cents per gallon from Faribault, Dundas, Northfield, and Farmington to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same and adopt such rates and charges as the commission should declare to be equal and reasonable.

A statement of the complaint thus made was forwarded by the commission, on the 29th of June, 1887, to the railway company, and it was called upon by the commission, on the 6th of July, 1887, to satisfy the complaint or answer it in writing at the office of the commission in St. Paul, on the 13th of July, 1887. . . . [On a hearing and investigation by the commissioners, the rate of two and a half cents a gallon, in ten-gallon cans, was declared by them to be an equal and reasonable rate for carrying milk from Owatonna and Faribault to St. Paul and Minneapolis, and the existing rate of three cents a gallon was pronounced unequal and unreasonable, and the plaintiff in error was directed to change its rates accordingly. The company neglected to obey, and the commission duly posted the new rates along the company's road, and applied to the Supreme Court of the State for a writ of *mandamus* to compel the company's obedience. An alternative writ was issued. The company answered denying the power of the legislature to delegate to a commission the authority to fix rates for transportation, as was attempted in the Act in question; alleging that the State, in this Act, was undertaking to deprive it of its property without due process of law; and that the old rate was reasonable and the new unreasonable, and the establishing of it a taking of property without due process of law. At the hearing, the company was refused leave to take testimony as to the reasonableness of the new

rate, and the company by a peremptory writ was ordered to change its rates as required by the commission. Costs were given against the company and a reargument was refused. Thereupon the company brought this writ of error.]

Mr. John W. Cary, for plaintiff in error.

Mr. Moses E. Clapp and *Mr. H. W. Childs*, for defendant in error.

Mr. W. C. Goudy, for appellant.

MR. JUSTICE BLATCHFORD, after stating the case as above reported, delivered the opinion of the court.

The opinion of the Supreme Court of Minnesota is reported in 38 Minnesota, 281. In it the court in the first place construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the Act) should be not simply advisory, nor merely *prima facie* equal and reasonable but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the Act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the Act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the Act under the Constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive. . . . [Here follows a history of the plaintiff in error, showing that it succeeded to the franchises of various other railroad companies.]

It is contended for the railway company that the State of Minnesota is bound by the contract made by the Territory in the charter granted to the Minneapolis and Cedar Valley Railroad Company; that a contract existed that the company should have the power of regulating its rates

of toll; that any legislation by the State infringing upon that right impairs the obligation of the contract; that there was no provision in the charter or in any general statute reserving to the Territory or to the State the right to alter or amend the charter; and that no subsequent legislation of the Territory or of the State could deprive the directors of the company of the power to fix its rates of toll, subject only to the general provision of law that such rates should be reasonable.

But we are of opinion that the general language of the ninth section of the charter of the Minneapolis and Cedar Valley Railroad Company cannot be held to constitute an irrevocable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the State. . . .

There is nothing in the mere grant of power, by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, which can be properly interpreted as authorizing us to hold that the State parted with its general authority itself to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company.

In *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, 325, the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at, that the right of a State reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant or words equivalent in law; and that a statute which grants to a railroad company the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation," does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the court said (p. 331): "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the pres-

such a final determination by the legislature would be bad. . . . Sup. the rate had been grossly lowered. Could the legislature do that itself or

the courts under any circumstances whatever
be bad? Yes. That would be arbitrary and might
result in

ent case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does

Does this make 'reasonableness' a judicial question? Gleason thinks it does. Thayer doesn't know but thinks it is still a legislative question.

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[CHAP. IV.]

By the second section of the statute in question, it is provided that

a commission the power to determine absolutely and finally railroad rates is void and unconstitutional.

MR. JUSTICE MILLER concurring.

I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions.

1. In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage.

2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the Legislature of Minnesota by the Act now under consideration.

3. Neither the legislature nor such commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

5. But until the judiciary has been appealed to, to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

8. But in the present case, where an application is made to the Supreme Court of the State to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to estab-

Subject
to review

lishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery.

9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment.

10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void.¹

¹ MR. JUSTICE BRADLEY (with whom concurred MR. JUSTICE GRAY and MR. JUSTICE LAMAR) dissenting.

I cannot agree to the decision of the court in this case. It practically overrules *Munn v. Illinois*, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation. The State might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the legislature to fix the tolls to be paid by those who use it; when a company is chartered not only to build a road, but to carry on public transportation upon it, it is for the legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express, when so declared by statute; implied, by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will.

Thus, the legislature either fixes the charges at rates which it deems reasonable; or merely declares that they shall be reasonable; and it is only in the latter case,

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where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: When the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing), has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there.

It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. (By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations.) It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make. The assertion of jurisdiction by this court makes it the duty of every court of general jurisdiction, State or Federal, to entertain complaints against the decisions of the boards of commissioners appointed by the States to regulate their railroads; for all courts are bound by the Constitution of the United States, the same as we are. Our jurisdiction is merely appellate.

The incongruity of this position will appear more distinctly by a reference to the nature of the cases under consideration. The question presented before the commission in each case was one relating simply to the reasonableness of the rates charged by the companies,—a question of more or less. In the one case the company charged three cents per gallon for carrying milk between certain points. The commission deemed this to be unreasonable, and reduced the charge to 2½ cents. In the other case the company charged \$1.25 per car for handling and switching empty cars over its lines within the city of Minneapolis, and \$1.50 for loaded cars; and the commission decided that \$1.00 per car was a sufficient charge in all cases.¹ The companies complain that the charges as fixed by the commission are unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative commission. The State court held that the legislature had the right to establish such a commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the State court was right, and the establishment of the commission, and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.

I think it is perfectly clear, and well settled by the decisions of this court, that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the legislature itself could do this, acting by its committees, and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might, or it might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command,—

¹ The report does not give the facts relative to this case.—Ed.

just as they would be at the command of the legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it.

In the case of *Davidson v. City of New Orleans*, 96 U. S. 97, we decided that the appointment of a board of assessors for assessing damages was not only due process of law, but the proper method for making assessments to distribute the burden of a public work amongst those who are benefited by it. No one questions the constitutionality or propriety of boards for assessing property for taxation, or for the improvement of streets, sewers and the like, or of commissions to establish county seats, and for doing many other things appertaining to the administrative management of public affairs. Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. In the *Railroad Commission Cases*, 116 U. S. 307, we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a State. It seems to me, therefore, that the law of Minnesota did not prescribe anything that was not in accordance with due process of law in creating such a board, and investing it with the powers in question.

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect — courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose.

If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was, that no State shall take private property for public use without just compensation, — and as if it was our duty to judge of the compensation. But there is no such clause in the Constitution of the United States. The Fifth Amendment is prohibitory upon the Federal government only, and not upon the State governments. In this matter, — just compensation for property taken for public use, — the States make their own regulations, by constitution, or otherwise. They are only required by the Federal Constitution to provide “due process of law.” It was alleged in *Davidson v. New Orleans*, 96 U. S. 97, that the property assessed was not benefited by the improvement; but we held that that was a matter with which we would not interfere; the question was, whether there was due process of law. p. 106. If a State court renders an unjust judgment, we cannot remedy it.

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I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction (as in these cases they have done), the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The legislature, in establishing the commission, did not exceed its power; and the commission, in acting upon the cases, did not exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount, between the commission and the companies, without any indication of intent on the part of the former to do injustice. The board may have erred; but if they did, as the matter was within their rightful jurisdiction, their decision was final and conclusive unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction.

It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But

such is the constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers, amongst which, in my judgment, is that of the regulation of railroads and other public means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public.

I am authorized to say that Mr. Justice Gray and Mr. Justice Lamar agree with me in this dissenting opinion.¹

In *Budd v. N. Y.*, 143 U. S. 517 (1892), the Supreme Court of the United States, after reaffirming the doctrine of *Munn v. Ill.*, 94 U. S. 113 (for which see that case, *infra*, p. 743), BLATCHFORD, J., for the court said: "It is further contended that, under the decision of this court in *Chicago, &c. Railway Co. v. Minnesota*, 134 U. S. 418, the fixing of elevator charges is a judicial question, as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges; and that, by the statute under consideration, an arbitrary rate is fixed, and all inquiry is precluded as to whether that rate is reasonable or not.

"But this is a misapprehension of the decision of this court in the case referred to. In that case, the Legislature of Minnesota had passed an Act which established a railroad and warehouse commission, and the Supreme Court of that State had interpreted the Act as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates. A railroad company, in answer to an application for a *mandamus*, contended that such rates in regard to it were unreasonable, and, as it was not allowed by the State Court to put in testimony in support of its answer, on the question of the reasonableness of such rates, this court held that the statute was in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws. That was a very different case from one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the legislature. See *Spencer v. Merchant*, 125 U. S. 345, 356. What was said in the opinion of the court in 134 U. S. had reference only to the case then before the court, and to charges fixed by a commission appointed under an Act of the Legislature, under a Constitution of the State which provided that all corporations, being common carriers, should be bound to carry 'on equal and reasonable terms,' and under a statute which provided that all charges made by a common carrier for the transportation of passengers or property should be 'equal and reasonable.'

"What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois in *Munn v. Illinois*, but the doctrine was laid down by this court in *Wabash, &c. Railway Co. v. Illinois*, 118 U. S. 557, 568, that it was the right of a State to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in *Dow v. Beidelman*, 125 U. S. 680, 686, it was said that it was within the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable.

"But in *Dow v. Beidelman*, after citing *Munn v. Illinois*, 94 U. S. 113 [and several

¹ Compare *Wellman v. Chic. &c. Ry. Co.*, 83 Mich. 592 (1890); *Clyde et al. v. Richm. & D. R. R. Co.*, 57 Fed. Rep. 436 (1893, C. C. U. S. So. Ca.).

other cases], as recognizing the doctrine that the legislature may itself fix a maximum beyond which any charge made would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law, the court said that it had no means, 'if it would under any circumstances have the power,' of determining that the rate fixed by the legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law, or that there had been any denial of the equal protection of the laws.

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable."

Compare *R. R. Co. v. Maryland*, 21 Wall 456, 471 (BRADLEY, J.); *Spencer v. Merchant*, ante, at p. 647; BRADLEY, J. (dissenting), in *Chicago, &c. Ry. Co. v. Minnesota*, ante, at p. 660, note; and *Paulsen v. Portland*, 149 U. S. 30, 38.

Of that [reasonableness], said the court (WAITE, C. J.), in *Terry v. Anderson*, 95 U. S. p. 633 (1877), "the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed." See *Pickering Phipps v. Lond. & N. W. Ry. Co.*, 66 L. T. Rep. 721.

Compare the function of the court in revising the verdict of a jury: "Not merely must the jury's verdict be conformable to the rules of law, but it must be defensible in point of sense and reason; it must not be absurd or whimsical. This is obviously a different thing from imposing upon the jury the judge's private standard of what is reasonable; as, for example, when the question for the jury itself is one of reasonable conduct. In such a case, the judges do not undertake to set aside the verdict because their own opinion of what is reasonable in the conduct on trial differs from the jury's. The question for the court, it will be observed, is not whether the conduct ultimately in question, e. g., that of a party injured in a railroad accident, was reasonable, but whether the jury's conduct is reasonable in holding it to be so; and the test is whether a reasonable person could, upon the evidence, entertain the jury's opinion. Can the conduct, which the jury are judging, reasonably be thought reasonable? Is that a permissible view?" — *Law and Fact in Jury Trials*, 4 Harv. Law Rev. 167, 168. And so further *Origin and Scope of Am. Doct. Const. Law*, 20-24.

In *State v. Vandersluis*, 42 Minn. 129, 131 (1889), the court (GILFILLAN, C. J.) said: "The only limit to the legislative power in prescribing conditions to the right to practise in a profession is that they shall be reasonable. Whether they are reasonable, — that is, whether the legislature has gone beyond the proper limits of its power, — the courts must judge. By the term 'reasonable' we do not mean expedient, nor do we mean that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and, especially, if it appeared that it must have been adopted for some other purpose, — such, for instance, as to favor or benefit some persons or class of persons, — it certainly would not be reasonable, and would be beyond the power of the legislature to impose."

It may be doubted that there is any difference between the action of a legislature and that of a legislative commission, as regards the questions involved in such a case as *Chic., &c. Ry. Co. v. Minnesota*, when once it is clear that the legislature has really *tried and capricious and beyond the power of the legislature to impose.*

158 U. S. 564 - Debs case
affirms this case.

EILENBECKER v. PLYMOUTH COUNTY.

SUPREME COURT OF THE UNITED STATES. 1890.

[134 U. S. 31.]

THE case is stated in the opinion.

Mr. William A. McKenney, for plaintiffs in error.

Mr. J. S. Struble, Mr. S. M. Marsh, and Mr. A. J. Baker, Attorney-General of Iowa, for defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Iowa.

The judgment which we are called upon to review is one affirming the judgment of the District Court of Plymouth County in that State. This judgment imposed a fine of five hundred dollars and costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth County for a period of three months, but they were to be

undertaken to confer upon the commission the power in question. If the legislature can exercise it, it would seem that it may confer on the commission a like authority.

Yet, as regards subordinate bodies, there is always the question of construction, as to what authority has, in fact, been conferred on them; and in passing on this, established common-law principles are applicable, which, ordinarily, and in the absence of clear legislative intention to the contrary, enable the courts to control their action much more readily than that of the legislature itself. If a commission or a local board acts unreasonably, the courts may set aside their action as not authorized by the legislature. Similar action by the legislature itself can be condemned only if it be unconstitutional.

In *Leader v. Moxon et al.*, 2 W. Bl. 924, where paving commissioners, with general powers "to pave, repair, sink, or alter [a certain street] in such manner as the commissioners shall think fit," proceeded to raise "the footway contiguous to the plaintiff's houses to the height of six feet, but in a regular descent from one end of the street to the other, . . . whereby the doors and windows of the ground-floors of the said houses were totally obstructed," — it was held, that "the commissioners had grossly exceeded their powers, which must have a reasonable construction. Their discretion is not arbitrary, but must be limited by reason and law. . . . Had Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose and given an equivalent for the loss that individuals might have sustained thereby."

In *Sharp v. Wakefield* [1891] Appeal Cases, 173, 179, LORD CHANCELLOR HALSBURY, in speaking of the authority of licensing justices in regard to the sale of intoxicating liquors, said: "An extensive power is confided to the justices in their capacity as justices, to be exercised judicially; and 'discretion' means, when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion, *Rooke's Case*, 5 Rep. 100 a; according to law, and not humor. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself. *Wilson v. Rastall*, 4 T. R. at p. 757." 7 L. J. 253

As to the general question of the legislative power over railroads, see also *Ch., B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155 (1876), and *R. R. Com. Cases*, 116 U. S. 307 (1885). — ED.

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Held, on the contempt proceedings the debts were not entitled to a trial by jury and hence were not deprived of liberty without due process of law. Courts have always had the power of vindicating their dignity

In *Ex parte*
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EILENBECKER v. PLYMOUTH COUNTY.

[CHAP. IV.

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released from confinement if the fine imposed was paid within thirty days from the date of the judgment.

This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine and beer, in Plymouth County, and the sentence was imposed upon a hearing by the court, without a jury, and upon evidence in the form of affidavits.

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It appears that on the 11th day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of these plaintiffs in error, praying that they should be enjoined from selling, or keeping for sale, intoxicating liquors, including ale, wine and beer, in that county. On the 6th of July the court ordered the issue of preliminary injunctions as prayed. On the 7th of July the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October complaints were filed, alleging that these plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the court, having no personal knowledge of the facts charged, ordered that a hearing be had at the next term of the court, upon affidavits; and on the 8th day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of injunction issued in said cause, and a sentence of fine and imprisonment, as already stated, entered against them.

Each plaintiff obtained from the Supreme Court of the State of Iowa, upon petition, a writ of *certiorari*, in which it was alleged that the District Court of Plymouth County had acted without jurisdiction and illegally in rendering this judgment, and by agreement of counsel, and with the consent of the Supreme Court of Iowa, the cases of the six appellants in this court were submitted together and tried on one transcript of record. That court affirmed the judgment of the District Court of Plymouth County, and to that judgment of affirmance this writ of error is prosecuted. . . . [Four assignments of error are here stated.]

The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States.

Livingston v. Moore, 7 Pet. 469; *The Justices v. Murray*, 9 Wall. 274; *Edwards v. Elliott*, 21 Wall. 532; *United States v. Cruik-*

and always has been, before and after the
the Amendment was adopted.

jury because no trial had yet been held, and
therefore he had not been denied a jury-trial.

shank, 92 U. S. 542; Walker v. Sauvinet, 92 U. S. 90; Fox v. Ohio, 5 How. 410; Holmes v. Jennison, 14 Pet. 540; Presser v. Illinois, 116 U. S. 252. . . .

This leaves us alone the assignment of error that the Supreme Court of Iowa disregarded the provisions of section 1 of Article XIV. of the amendments to the Constitution of the United States, because it upheld the statute of Iowa,¹ which it is supposed by counsel deprives persons charged with selling intoxicating liquors of the equal protection of the law, abridges their rights and privileges, and denies to them the right of trial by jury, while in all other criminal prosecutions the accused must be presented by indictment, and then have the benefit of trial by a jury of his peers.

The first observation to be made on this subject is, that the plaintiffs in error are seeking to reverse a judgment of the District Court of Plymouth County, Iowa, imposing upon them a fine and imprisonment for violating the injunction of that court, which had been regularly issued and served upon them. Of the intentional violation of this injunction by plaintiffs we are not permitted to entertain any doubt, and, if we did, the record in the case makes it plain. Neither is it doubted that they had a regular and fair trial, after due notice, and opportunity to defend themselves in open court at a regular term thereof.

The contention of these parties is, that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has

¹ Section 1543 of the Code of Iowa, as amended by c. 143 of the Acts of the Twentieth General Assembly, is as follows:

SEC. 1543. In case of violation of the provisions of either of the three preceding sections or of section fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture, or sale, or keeping, with intent to sell, use or give away, of any intoxicating liquors, is carried on or continued or exists, and the furniture, fixture, vessels and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of chapter 47, title 25 of this Code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity, to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceeding shall be punished as for contempt, by fine of not less than five hundred nor more than one thousand dollars or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court.

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always been one of the attributes — one of the powers necessarily incident to a court of justice — that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

In the case in this court of *Ex parte Terry*, 128 U. S. 289, this doctrine is fully asserted and enforced; quoting the language of the court in the case of *Anderson v. Dunn*, 6 Wheat. 204, 227, where it was said that “courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates;” citing also with approbation the language of the Supreme Judicial Court of Massachusetts in *Cartwright's Case*, 114 Mass. 230, 238, that “the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights.”

And this court, in *Terry's* case, held that a summary proceeding of the Circuit Court of the United States without a jury, imposing upon *Terry* imprisonment for the term of six months, was a valid exercise of the powers of the court, and that the action of the Circuit Court was also without error in refusing to grant him a writ of *habeas corpus*. The case of *Terry* came into this court upon application for a writ of *habeas corpus*, and presented, as the case now before us does, the question of the authority of the Circuit Court to impose this imprisonment on a summary hearing without those regular proceedings which include a trial by jury — which was affirmed. The still more recent cases of *Ex parte Savin*, 131 U. S. 267, and *Ex parte Cuddy*, 131 U. S. 280, assert very strongly the same principle. In *Ex parte Robinson*, 19 Wall. 505, 510, this court speaks in the following language:

“The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2d, 1831. 4 Stat. 487.”

The statute, now embodied in § 725 of the Revised Statutes, reads as follows: “The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the mis-

behavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts."

It will thus be seen that even in the Act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. This statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the States by virtue of their organization, and that the punishments which they were authorized to inflict for a disobedience to their writs and orders were ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts; was due process of law at the time the Fourteenth Amendment of the Federal Constitution was adopted; and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts.

So far from any statute on this subject limiting the power of the courts of Iowa, the Act of the Legislature of that State, authorizing the injunction which these parties are charged with violating, expressly declares that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.

The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceed-

ing or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit.

¶ We might rest the case here; but the plaintiffs in error fall back upon the proposition that the statute of the Iowa Legislature concerning the sale of liquors, under which this injunction was issued, is itself void, as depriving the parties of their property and of their liberty without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued, for the contempt of which these parties have been sentenced to imprisonment and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that statute. We do not know that they would have been refused a trial by jury if they had demanded it. Until the trial of that case has been had they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be void and the remainder may be valid. That part of this statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors with intent to sell the same within this State, and all the prohibitory clauses of the statute, have been held by this court to be within the constitutional powers of the State Legislature, in the cases of *Mugler v. Kansas*, 123 U. S. 623, and *Powell v. Pennsylvania*, 127 U. S. 678.

If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offence as a crime after it has been committed.

We think it was within the power of the court of Plymouth County to issue the writs of injunction in these cases, and that the disobedience

to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court.

The judgment of the Supreme Court of Iowa is

Affirmed.

In *Carleton v. Rugg*, 149 Mass. 550 (1889), on a petition in equity, for the abatement of a nuisance, and an injunction restraining the continuance of it, the court (KNOWLTON, J.) said: "The St. of 1887, c. 380, § 1, is as follows: 'The Supreme Judicial Court and Superior Court shall have jurisdiction in equity upon information filed by the district attorney for the district, or upon the petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or is used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and an injunction for such purpose may be issued by any justice of either of said courts.'

"The first question reported for our decision is, whether this statute is constitutional. The respondents contend that it is in conflict with Article XII. of the Declaration of Rights, which provides that 'no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, . . . but by the judgment of his peers, or the law of the land.' . . .

"We do not understand the respondents to contend that the provisions of the Pub. Sts., c. 100, which regulate the sale of intoxicating liquors, or those of the Pub. Sts., c. 101, § 6, which declare that 'all buildings, places, or tenements . . . used for the illegal keeping or sale of intoxicating liquor shall be deemed common nuisances,' are unconstitutional. But the argument is, that, by a process in equity for the abatement of an alleged common nuisance of the kind named in this statute, they are liable to be deprived of their property, immunities, and privileges otherwise than by the judgment of their peers or the law of the land.

"The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested. That which is declared by a valid statute to be a nuisance, is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime, does not deprive a court of

-ing of a nuisance.

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equity of the power to abate the nuisance. *Attorney-General v. Hunter*, 1 Dev. Eq. 12. *People v. St. Louis*, 5 Gilman, 351. *Ewell v. Greenwood*, 26 Iowa, 377. *Minke v. Hopeman*, 87 Ill. 450. . . .

"It should be borne in mind, that this is not a statute which professes to look to the conduct of persons to prevent the commission of crime. If it were, it would have no legitimate place in our jurisprudence. There is no doubt that in hearings upon applications for preliminary injunctions and orders *pendente lite* in suits in equity, and in proceedings for the punishment of contempt of court, the parties have no constitutional right to a trial by jury. It would be an anomalous proceeding for a court to enjoin a defendant from committing the crime of larceny, or of selling intoxicating liquors, with a view to punish as disobedience of the injunction and contempt of court the same act which was before punishable as a crime. If that could be done, an accused person through a mere change of form in the proceedings might be punished for a crime without a trial by jury, and in violation of both the Federal and State constitutions. There would be strong ground for contending that a statute which should attempt to authorize such a method of preventing or punishing ordinary crimes would be unconstitutional. Indeed, even where a plaintiff seeks the aid of a court of equity to protect him from irreparable injury through the threatened publication of a libel, or the commission of some other like crime, the courts decline to interfere. *Brandreth v. Lance*, 8 Paige, 24; *Fleming v. Newton*, 1 H. L. Cas. 363, 376; *Boston Diatite Co. v. Florence Manuf. Co.*, 114 Mass. 69." . . .

*Injunction to issue.*¹

¹ And so *State v. Samderson*, 25 Atl. Rep. 588 (N. H. December, 1889).

In *Carleton v. Rugg*, FIELD, J., gave a dissenting opinion in the course of which he said: "The phrase 'due process of law,' contained in the Fourteenth Amendment of the Constitution of the United States, has not been construed to mean that parties shall be entitled to a jury trial in civil suits at common law, or that a person shall be tried for a felony or a capital crime only on presentment of a grand jury, and it is doubtful, even, if it would be held that the amendment secures a trial by jury in criminal cases. The clause of that amendment we are considering is a restraint on all the States of the United States, and the Supreme Court of the United States has taken notice that there are considerable diversities in the jurisprudence of the different States. . . . Apparently any mode of procedure duly established by a State, which provides for an impartial trial, and does not violate the fundamental principles of general jurisprudence, would be due process of law within the meaning of that amendment. A different construction has been given by this court to the phrase 'the law of the land,' contained in Article XII. of our Declaration of Rights, and *Kansas v. Ziebold* is not an authority upon the meaning of our Constitution. See *Hurtado v. People*, 110 U. S. 516; *Jones v. Robbins*, and other Massachusetts cases cited *ubi supra*. It will hardly be contended that intoxicating liquors can be destroyed in this Commonwealth because they are kept for sale in violation of law, unless this fact has been found by a jury. *Fisher v. McGirr*, 1 Gray, 1; *Brown v. Perkins*, 12 Gray, 89. See *Ely v. Superiors*, 36 N. Y. 297; *Gray v. Ayres*, 7 Dana, 375; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Rex v. Pappineau*, Strange, 686. . . .

"The Massachusetts Statute of 1887, c. 380, was not passed for the abatement of a nuisance by destroying or changing the character or condition of tangible property, or by removing obstructions to the exercise of a public right. Its purpose was, I

think, to prevent the sale of liquor by a jury. That the statute here attempts to do indirectly what the Court forbids it to do directly.

W. A. Field

IN *In re Converse*, 137 U. S. 624 (1890), in affirming a judgment of a circuit court which denied a petition for the writ of habeas corpus on the part of a lawyer who had been sentenced in a State court for embezzlement on his own confession, CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court as follows: "The Supreme Court of Michigan held that the information charged the respondent with the crime of embezzlement; that the defendant was

think, to prevent the illegal sale of intoxicating liquors by punishing by fine or imprisonment, or by both, without limit, in the discretion of the court, any person who sells or keeps such liquors for sale after he has been enjoined by the court. The prevention of crime by the punishment of persons found guilty of an offence against a general law is the end aimed at. The keeping or selling of intoxicating liquors without a license was a well-known offence when our Constitution was adopted, and the procedure for punishing it, or for forfeiting the liquors, was also well known. Articles XII. and XV. were inserted in the Declaration of Rights as a protection to every individual in his life, liberty, and property. If a statute had given jurisdiction in equity to hear without a jury an information like this, and had authorized the court, on finding the respondent guilty, to punish him in its discretion, without limit, by fine, or imprisonment, or both, in what substantial respect would such a statute differ from this? The legislature cannot do indirectly what it cannot do directly; it cannot change the nature of things by affixing to them new names. If the legislature, by statute, can authorize a court in a public prosecution to enjoin any person from illegally keeping or selling intoxicating liquors in any specified place within the Commonwealth, why cannot it authorize a court to enjoin any person from illegally keeping or selling intoxicating liquors anywhere within the Commonwealth? and, if this can be done, why can it not authorize a court at the suit of the Commonwealth to enjoin any person from doing any illegal or criminal act anywhere within the Commonwealth, and to try without a jury any person so enjoined, on a charge of having violated the injunction, and to punish him by fine and imprisonment, without limit, if the court find him guilty?

"Except for constitutional limitations, the legislature could deal with all crimes by way of injunctions in equity. Indeed, if this jurisdiction were confined to crimes having some direct relation to a particular building, place, or tenement, the number of such crimes is large, and all crimes have some relation to place, as they must be committed somewhere. The harboring or concealing of criminals; the receiving or concealing of stolen or embezzled property; the making or keeping of instruments intended for criminal use; the violation of the provisions of criminal statutes regulating trade; burglary, arson, and other similar offences, — have a direct relation to a particular building, place, or tenement, and the building, place, or tenement in which these offences are committed may be said to be used for the purpose. In the prosecution of crimes by way of injunctions in equity, the existing Statute of Limitations would not be a defence, and the whole course of criminal procedure would be changed. It was not the intention of the Constitution that persons should be punished for violating general laws by proceedings in equity, or by a court acting without a jury, and subject to no limitations upon its power to fine and imprison except its own discretion. The safeguards of the common law were carefully secured by the Declaration of Rights, both in public prosecutions and in private suits, 'except in cases in which it has heretofore been otherwise used and practised.' This is not such a case, and the only thing novel about it is the procedure. Statutes against illegally selling or keeping for sale intoxicating liquors, from the earliest times, have been enforced by criminal complaints or indictments, or by penal actions. Such statutes were never enforced in equity anywhere when the Constitution was adopted. I think that the statute under which the present proceedings were brought is inconsistent with Article XII. of the Declaration of Rights.

"MR. JUSTICE DEVENS and MR. JUSTICE WILLIAM ALLEN concur in this dissent."

arbitrarily or not? If he has had due administration of law according to judicial methods he is not arbitrarily deprived of rights even though the judge be very bad

Deft. was guilty of embezzlement - must be convicted. a petition for habeas corpus was denied because state is not bound to deem a person guilty of a violation of its able to turn in the Court of the U. S. because a decision even a wrong of its to - est can while a within jurisdiction. Not a question whether petition was a lawful conviction. Has the Court a

called upon to plead to this charge when arraigned; that he pleaded guilty of embezzlement, and undoubtedly understood when he made his plea that he was pleading guilty to the felony charged; that this conclusion was fortified by the private examination required by statute to be made by the judge before sentencing upon a plea of guilty, which was shown to have been had in this case; that the fact that the respondent collected the money as an attorney was immaterial; that if the act contained all the elements of embezzlement, he was guilty of the crime and was properly convicted; that an attorney when he collects money for his client acts as the agent of his client as well as his attorney, and if, after making the collection, he appropriates the money to his own use with the intention of depriving the owner of the same, he is guilty of the crime of embezzlement; that the conviction was warranted by the plea; and that the judgment should therefore be affirmed. As remarked by Judge Brown, it is no defence to an indictment under one statute that a defendant might also be punished under another. And as the highest judicial tribunal of the State of Michigan ruled that the word 'agent' in section 9151 of the statutes of that State applied to attorneys-at-law, and as the information charged the defendant with embezzlement under that section, and he pleaded guilty to embezzlement as an attorney-at-law, the affirmance of the conviction necessarily followed. In the view of the statute taken by the court, the plea admitted the truth of the charge.

"It is not our province to inquire whether the conclusion reached and announced by the Supreme Court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the State Constitution and laws.

"The single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law; for there is no pretence of an abridgment of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. And, conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision. Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

"We repeat, as has been so often said before, that the Fourteenth

Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty, and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities or depriving him of the law of the land of his domicile. *Arrowsmith v. Harmoning*, 118 U. S. 194; *Baldwin v. Kansas*, 129 U. S. 52; *In re Kemmler*, 136 U. S. 436." *Judgment affirmed.*

IN *Cullwell v. Texas*, 137 U. S. 692 (1890), in dismissing a case brought upon error to the Court of Appeals of Texas, CHIEF JUSTICE FULLER, for the court, said, "By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia v. Okely*, 4 Wheat. 235, 244. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary. *Hurtado v. California*, 110 U. S. 516, 535. No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the State courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to."

"Morley case

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Ch. in the preliminary held that
interest was a matter of statutory damages
and the judgment did not impair the obligation
of contracts. So the only question here is
whether a judgment alone impairs the obligation
of contract. Held that it did not.

... entitled to ... because judgment was ...

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IN *Morley v. Lake Shore &c. Ry. Co.*, 146 U. S. 162 (1892), on error to the Court of Appeals of New York, where the validity of a State enactment reducing the rate of interest on judgments was in question, as applied to a judgment obtained before its passage, MR. JUSTICE SHIRAS, for the court, said: "The further contention of the plaintiff in error, that he has been deprived of his property without due process of law, can be more readily disposed of. If, as we have seen, the plaintiff has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property; and whether or not a statutory change in the rate of interest thereafter to accrue on the judgment can be regarded as a deprivation of property, the adjudication of the plaintiff's claims by the courts of

our state constitute due process of law.

What was the complaint here? Deprived of prop. w/o due process

He was not deprived of property when he had all that was entitled to. Because judgment was bad and did not

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his own State must be admitted to be due process of law. Nor are we authorized by the Judiciary Act to review this judgment of the State court, because this judgment refuses to give effect to a valid contract or because such judgment in its effect impairs the obligation of a contract. If we did, every case decided in the State courts could be brought here, when the party setting up a contract alleged that the court took a different view of its obligation from that which he held. *Know v. Exchange Bank*, 12 Wall. 379, 383.”¹

IN *Charlotte, &c. Railroad Co. v. Gibbs*, 142 U. S. 386 (1892), MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

Notwithstanding the several objections taken in the complaint to the assessment and tax upon the railroad companies to meet the expenses and salaries of the railroad commissioners, the argument of counsel on the hearing was confined to the supposed conflict of the laws authorizing the tax with the inhibition of the Fourteenth Amendment of the Constitution of the United States. All other objections were deemed to be disposed of by the decision of the Supreme Court of the State, that the laws complained of are not in conflict with its Constitution.

The property of railroad companies in South Carolina is subjected by the general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality in its assessment are imposed. The further tax laid upon them to meet the expenses and salaries of the railroad commissioners is not in proportion to the value of their property, but according to their gross income, proportioned to the number of miles of their roads in the State. This tax is stated to be beyond any which is levied upon other corporations to meet an expenditure for State officers, and, therefore, it is contended, constitutes an unlawful discrimination against railroad corporations, imposing an unequal burden upon them, in conflict with the constitutional amendment which ordains that no State shall deny to any person the equal protection of the laws. Private corporations are persons within the meaning of the amendment; it has been so held in several cases by this court. *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S. 394; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189; *Minneapolis & St Louis Railroad Co. v. Beckwith*, 129 U. S. 26.

If the tax were levied to pay for services in no way connected with the railroads, as, for instance, to pay the salary of the executive or judicial officers of the State, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of un-

¹ See also *In re Kemmler*, 136 U. S. 436, 448; *York v. Texas*, 137 U. S. 15; *In re Manning*, 139 U. S. 504. — ED.

where the interests of the public and of individuals
blended in any work or service imposed by law
whether the cost shall be thrown entirely upon individuals
upon the state, or be apportioned between them, is

lawful discrimination against the railroad corporations, and of their not receiving the equal protection of the laws. But there is nothing of this nature in the tax in question. The railroad commissioners are charged with a variety of duties in connection with railroads, the performance of which is of great importance in the regulation of those instruments of transportation. . . .

It is evident, from these and many other provisions that might be stated, that the duties of the railroad commissioners, when properly discharged, must be in the highest degree beneficial to the public, securing faithful service on the part of the railroad companies, and safety, convenience, and comfort in the operation of their roads. That the State has the power to prescribe the regulations mentioned there can be no question. Though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested for that purpose with special privileges. They are allowed to exercise the State's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 179. That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the Fourteenth Amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the ex-

Right
of
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ercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making any unjust discrimination against them. & All railroad corporations in the State are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and therefore no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered. The legislative and constitutional provision of the State, that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the State to meet the special service required. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri Pacific Railway, v. Humes*, 115 U. S. 512.

There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening, or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan v. Louisiana*, 118 U. S. 455, 466. (So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, Chattanooga & St. Louis Railway v. Alabama*, 128 U. S. 96, 101. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole State. Thus, in *County of Mobile v. Kimball*, 102 U. S. 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole State was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals, or upon the State, or be apportioned between them, is matter of legislative direction.

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We see no error in the ruling of the court below upon the Federal question presented, and the conclusion we have reached renders it unnecessary to consider how far the obligation of the corporation was affected by the alleged amendment made to its charter.

Judgment affirmed.

JUSTICES BRADLEY and GRAY did not sit in this case nor take part in its decision.

NEW YORK, ETC., RAILROAD COMPANY v. BRISTOL ET AL.

SUPREME COURT OF THE UNITED STATES. 1894.

[14 *Sup. Court Rep.* 437.]¹

IN error to the Supreme Court of Errors of the State of Connecticut. In pursuance of an Act of the Legislature of Connecticut approved June 19, 1889, relating to the grade crossings of railroads, the railroad commissioners of that State, on September 2, 1890, made an order reciting that whereas the directors of the New York & New England railroad company had failed to remove, or apply for the removal, during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad, and whereas, in their opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as "Main Street," in the town of Bristol, and directing a hearing upon the matter, with notice to the railroad company, the town, and the owners of land adjoining that portion of the highway. The hearing was had on several days, from September 24, 1890, to February 11, 1891; and the commissioners, being of opinion that the financial condition of the company warranted the order, and that public safety required it, ordered the crossing removed, and determined and directed the alterations, changes, and removals to be made and done, and that they be executed by the railroad company at its sole expense, including damages occasioned thereby. The company appealed from this order to the Superior Court of the County of Hartford, the petition for appeal setting forth various grounds therefor. That court, upon hearing the parties and their evidence, found as facts that the railroad company was financially able to execute the commissioners' order, and that the safety of the public required the removal of the grade crossing; and affirmed the order. The company appealed to the Supreme Court of Errors of Connecticut, which decided that there was no error in the judgment appealed from (62 Conn. 527, 26 Atl. 122); and thereupon a writ of error was allowed to this court, and errors assigned, as follows:—

"(1) The said court erred in holding that the statute under which

¹ The statement of facts is shortened. This case will appear in 151 U. S. 556. — ED.

the Co. with the holders of its bonds and preferred stock by making it impossible to pay interest and dividends; that it took property without due process of law and denied to the corp. the equal protection of the laws. Held, this corp. was subject to the

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were had the proceedings as set forth in the order of the railroad commissioners exemplified in the record of the case justified said order, and in affirming the judgment of the Superior Court in and for Hartford County, affirming said order, and in overruling plaintiff's claim that said statute was void as violating the Constitution of the United States, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making it impossible for said company to pay the interest on its bonds and dividends on its preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently; and, further, in that it took the property of the company without due process of law, and denied to it the equal protection of the law.

"(2) The said court erred in overruling the claim of the plaintiff in error in the twelfth paragraph of its petition of appeal from the railroad commissioners to the Supreme Court, as set forth in the record, that said statute was void, and was no justification of said order, under the Constitution of the United States and the Fourteenth Amendment thereof."

Chas. E. Perkins, for plaintiff; *John J. Jennings* and *H. C. Robinson*, for defendants.

MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the court. . . .

It must be admitted that the Act of June 19, 1889, is directed to the extinction of grade crossings, as a menace to public safety, and that it is therefore within the exercise of the police power of the State. And, as before stated, the constitutionality of similar prior statutes, as well as of that in question, tested by the provisions of the State and Federal Constitutions, has been repeatedly sustained by the courts of Connecticut. *Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849; *Westbrook's Appeal*, 57 Conn. 95, 17 Atl. 368; *New York & N. E. R. Co.'s Appeal*, 58 Conn. 532, 20 Atl. 670; *Woodruff v. Railroad Co.*, 59 Conn. 63, 20 Atl. 17; *State's Attorney v. Selectmen of Branford*, 59 Conn. 402, 22 Atl. 336; *New York & N. E. R. Co. v. City of Waterbury*, 60 Conn. 1, 22 Atl. 439; *City of Middletown v. New York, etc., R. Co.*, 62 Conn. 492, 27 Atl. 119.

In *Woodruff v. Catlin*, the court, speaking through Pardee, J., said, in reference to a similar statute: "The Act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature, having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them, severally, to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the ac-

and exercise of the police power of the state will not be injured into by the U. S. Sup. Ct. { P. 672 }

there was no arbitrary exercise of legislative power.
The R. R. Co. had a hearing in court. The act was

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complishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; and may enforce obedience to its judgment. That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

And as to this Act the court, in 58 Conn. 532, 20 Atl. 670, on this Company's appeal, held that grade crossings were in the nature of nuisances, which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement.

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468. And also that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. 267; *Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48; *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson v. Jessup*, 15 Wall. 454.

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✓ The charter of this company was subject to the legislative power over it of amendment, alteration, or repeal, specifically and under general law. 5 Priv. Laws Conn. pp. 543, 547; 7 Sp. Laws Conn. p. 466; 8 Sp. Laws Conn. p. 353; Sp. Laws Conn. 1881, p. 64; Gen. St. 1875, p. 278; Gen. St. 1888, § 1909; *New York, etc., R. Co. v. City of Waterbury*, 60 Conn. 1, 22 Atl. 439.

The contention seems to be, however, that the legislature, in discharging the duty of the State to protect its citizens, has authorized by the enactment in question that to be done which is, in certain particulars, so unreasonable, and so obviously unjustified by the necessity invoked, as to bring the Act within constitutional prohibitions.

The argument is that the existing grades of railroad crossings were legally established, in accordance with the then wishes of the people, but, with the increase in population, crossings formerly safe had become no longer so; that the highways were chiefly for the benefit of the local public, and it was the duty of the local municipal corporation to keep them safe; that this law applied to railroad corporations treatment never accorded to other citizens in allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on those companies, and in that respect, and in the exemption of the town from its just share of the burden, denied to them the equal protection of the laws.

And further that the order, and therefore the law which was held to authorize it, amounted to a taking of property without due process, in that it required the removal of tracks many feet from their present location, involving the destruction of much private property, the excavation of the principal highway, and those communicating, and the building of an expensive iron bridge, all at the sole expense, including damages, of the company, without a hearing as to the extent of the several responsibilities of the company and the town, or as to the expense of the removal of this dangerous crossing, as compared with other dangerous crossings, or of the degree of the responsibility of the company for the dangers existing at this particular crossing. The objection is not that hearing was not required and accorded, which it could not well be, in view of the protracted proceedings before the commissioners and the Superior Court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed, and that the particular crossing to be removed was authorized to be prejudged.

It is further objected that the Supreme Court had so construed the statute that, upon the issue whether the financial condition of the company warranted the order, no question of law could be raised as to the extent of the burdens which a certain amount of financial ability would warrant, and thus, in that aspect, by reason of the large amount of expenditure which might be, and as matter of fact was, in this instance, required, the obligation of the contracts made by the company with the holders of its securities was impaired. Complaint is made in this connection of the striking out by the Superior Court of certain paragraphs of the petition on appeal, held by that court and the Supreme Court to plead mere matters of evidence, and the decision by the Supreme Court that all the material issues were met by the findings. Those issues were stated by the court to be whether or not the company's directors had removed, or applied for the removal of, a grade crossing, as required by the statute; whether or not the grade crossing ordered to be removed by the commissioners was in fact a dangerous one, which the directors ought to have removed, or for the removal of which the directors ought to have applied; and whether or not the company's financial condition was such as to warrant the order.

And upon these premises it is urged, in addition, that the right to

amend the charter of the corporation was not controlling, because that did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them, for purposes of management and control, under a corporate organization created by special law, was nevertheless private property, not by virtue of the charter, but "by force of the most fundamental and general laws of modern society, which, from their nature, necessarily protect alike and fully all legitimate acquisitions of the members of the community, no matter whether held by them as individuals or partnerships or associations or corporations."

The Supreme Court of Connecticut held that the statute operated as an amendment to the charters of the railroad corporations affected by it; that, as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that the statute was not unconstitutional, in authorizing the commissioners to determine their own jurisdiction, and that, besides, the right of appeal saved the railroad companies from any harm from their findings; that it was the settled policy of the State to abolish grade crossings as rapidly as could be reasonably done; and that all general laws and police regulations affecting corporations were binding upon them without their assent.

We are asked, upon the grounds above indicated, to adjudge that the highest tribunal of the State in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the State of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

But this court cannot proceed upon general ideas of the requirements of natural justice, apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

As observed by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, 104, the Fourteenth Amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." To use the language of Mr. Justice Field in *Railway Co. v. Humes*, 115 U. S. 512, 520, 6 Sup. Ct. 110, "it is hardly necessary to say that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity, and that the remedy for evils of that character is to be sought from State legislatures."

The conclusions of this court have been repeatedly announced, to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the

public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination, and no denial of the equal protection of the laws, in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State that, in such particulars, a law enacted in the exercise of the police power of the State is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. } *Railway Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28; *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47; *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231; *Railroad Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. 255; *Railroad Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870.

Judgment affirmed.

NOTE.

The subjects treated in this chapter are intimately connected with those of the next, and are further illustrated there. — ED.

This police power contains a mass of power that can't be very well classified.

CHAPTER V.

Residue of
 UNCLASSIFIED [^]LEGISLATIVE POWER. THE SO-CALLED
 POLICE POWER.¹

COMMONWEALTH v. ALGER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851.

[7 *Cush.* 53.]

This was an indictment against the defendant for an alleged breach of the statutes of this Commonwealth establishing the commissioners' lines, so-called, in the harbor of Boston, by erecting, building, and maintaining a wharf over and beyond those lines into said harbor.

The indictment was found and returned into the Municipal Court of the city of Boston at June Term, 1849. It set forth the following statutes for fixing and limiting the lines of the harbor of Boston: "An Act to preserve the Harbor of Boston, and to prevent Encroachments therein," passed April 19, 1837. St. 1837, c. 229, 7 Special Laws, 808. . . .

The first and second sections of the Act of 1837, c. 229, established a line by local objects designated from the lower South Boston Free Bridge, around the easterly and northerly sides of the city, to the abutment on the Boston side of Warren Bridge, above Charles River Bridge. The third, fourth, fifth, and sixth sections of this Act were as follows. [These are given in a note below.² The case also recites the substance

¹ Discussions of what is called the "police power" are often un instructive, from a lack of discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter, — what are the limits of legislative power in general? In talking of the "police power," sometimes the question relates to the limits of a power admitted and fairly well-known, as that of taxation or eminent domain; sometimes to the line between the local legislative power of the States and the Federal legislative power (sometimes to legislation as settling the details of municipal affairs, and local arrangements for the promotion of good order, health, comfort, and convenience) sometimes to that special form of legislative action which applies the maxim of *Sic utere tuo ut alienum non ledas*, adjusts and accommodates interests that may conflict, and fixes specific limits for each. But often, the discussion turns upon the true limits and scope of legislative power in general, — in whatever way it may seek to promote the general welfare. — ED.

² "SECTION 3. No wharf, pier, or building, or encumbrance of any kind, shall ever hereafter be extended beyond the said line into or over the tide-water in said harbor.

"SECTION 4. No person shall enlarge or extend any wharf or pier, which is now

of Acts of 1840, 1841, and 1847, altering the former lines or establishing others.] . . .

The indictment then averred that all the parts of the harbor of Boston, outside of and beyond the commissioners' lines, and between those lines and the high sea, were, and from the time whereof the memory of man was not to the contrary, an ancient, navigable harbor, and an ancient and common highway for all citizens of the Commonwealth. . . . [Here follow the formal charges of unlawful building beyond the lines.]

At the trial in the Municipal Court before WELLS, C. J., at September Term, 1849, the attorney for the Commonwealth put in evidence a statement agreed to and signed by himself and the defendant, exhibiting the following facts: The defendant is, and for more than thirty years past has been, seised of an estate on Fourth Street in South Boston, consisting of upland and of flats belonging thereto, just above the old South Boston Bridge, and bounding on that arm of the sea, lying between Boston proper and South Boston, in and through which the sea ebbs and flows to and from a bay above, called South Bay. In 1843, he began to build a wharf on his said flats, and constructed the northerly wall thereof from his upland nearly to the channel, and then filled in and constructed said wharf, but did not complete it until the commissioners' line of 1847 had been established, after which he built the triangular piece set forth in the indictment, which forms a part of the wharf as originally commenced by him. This triangular piece is beyond said line, but is built on the defendant's own flats; it is not one hundred rods from the upland, is not below low water-mark, is no injury to navigation, and is not so far beyond the commissioners' line or so near the channel as the northerly wall of the wharf was built in 1843.

No other evidence was offered.

The defendant contended and requested the judge to rule and instruct the jury that the evidence offered did not sustain the indictment, and that the defendant, upon these facts, was entitled to a verdict. But the judge refused so to rule, and instructed the jury that on the evidence introduced, if believed, the government were entitled to a verdict. Whereupon the jury returned a verdict of guilty; and the

erected on the inner side of said line, further towards the said line than such wharf or pier now stands, or than the same might have been lawfully enlarged or extended before the passing of this Act, without leave first obtained from the legislature.

"SECTION 5. No person shall in any other part of the said harbor of Boston, belonging to the Commonwealth, erect or cause to be erected any wharf or pier, or begin to erect any wharf or pier therein, or place any stones, wood, or other materials in said harbor, or dig down or remove any of the land covered with water at low tide, in said harbor, with intent to erect any wharf or pier therein, or to enlarge or extend any wharf or pier now erected: *provided, however,* that nothing herein contained shall be construed to restrain or control the lawful rights of the owners of any lands or flats in said harbor."

[Section 6 imposes penalties, and declares the forbidden obstructions to be nuisances.]

rights. Evidence was offered here that the extension of the wharf was not injurious to navigation &c.

presiding judge, being of opinion that the questions of law arising in the case were so doubtful and important as to require the decision of this court, with the consent of the defendant, reported the case for the purpose of presenting those questions.

The case was argued at March Term, 1850.

S. D. Parker, County Attorney, for the Commonwealth.

B. R. Curtis and *C. A. Welch*, for the defendant.

The opinion was delivered at March Term, 1853.

SHAW, C. J. In proceeding to give judgment in the present case, the court are deeply impressed with the importance of the principles which it involves, and the magnitude and extent of the great public interests, and the importance and value of the private rights, directly or indirectly to be affected by it. It affects the relative rights of the public and of individual proprietors, in the soil lying on tide-waters, between high and low water-mark, over which the sea ebbs and flows, in the ordinary action of the tides. . . .

The uncontested facts in the present case are, that the defendant was owner of land, bounded on a cove or arm of the sea, in which the tide ebbed and flowed, that he built the wharf complained of, on the flats before his said land, between high and low water-mark, and within one hundred rods of his upland, but below the commissioners' line as fixed by one of these statutes; although it was so built as not to obstruct or impede navigation. This certainly presents the case most favorably for the defendant.

We may, perhaps, better embrace the several subjects involved in the inquiry, by considering,

First, What are the rights of owners of land, bounding on salt water, whom it is convenient to designate as riparian proprietors, to the flats over which the tide ebbs and flows, as such rights are settled and established by the laws of Massachusetts; and,

Second, What are the just powers of the legislature to limit, control, or regulate the exercise and enjoyment of these rights.

I. By the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, the title to the land or property in the soil, under the sea, and over which the tide-waters ebbed and flowed, including flats, or the sea-shore, lying between high and low water-mark, was in the king, as the representative of the sovereign power of the country. But it was held by a rule equally well settled, that this right of property was held by the king in trust, for public uses, established by ancient custom or regulated by law, the principal of which were for fishing and navigation. These uses were held to be public, not only for all the king's subjects, but for foreigners, being subjects of States at peace with England, and coming to the ports and havens of England, with their ships and vessels, for the purposes of trade and commerce. . . .

Assuming that by the common law of England, as above stated, the right of riparian proprietors, bounding upon tide-waters, extended to

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high water-mark only, and assuming that the first settlers of Massachusetts regarded the law of England as their law, and governed themselves by it, it follows that the earliest grants of land bounding on tide-waters would be to the high water-line and not below it, and would have so remained but for the colony ordinance, now to be considered.

This is commonly denominated the ordinance of 1641; but this date is probably a mistake. It is found in the Ancient Charters, 148, in connection with another on free fishing and fowling, and marked 1641, 47. That on free fishing, etc., is taken in terms from the "Body of Liberties," adopted and passed in 1641, leaving the date 1647 to apply to the other subject respecting ownership in coves, etc., about salt water. See an interesting work, "Remarks on the Early Laws of Massachusetts Bay," by Francis C. Gray. 8 Mass. Hist. Soc. Coll. (3d series), 191, 215. This work contains, probably for the first time in print, a full copy of the "Body of Liberties," which, there is evidence to believe, were adopted and sanctioned by the colonial government in 1641, but were never printed entire with the colony laws, although many of them were embodied in terms in particular ordinances. But the date is quite immaterial, and the only purpose of making this explanation is to show why these two subjects, separate in their origin, were so connected together in the publication of the colony laws, that it seems necessary now to consider them together as one act.

The whole article, as it stands in the Ancient Charters and in the edition of the colony laws of 1660, is as follows:—

"SECT. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves, and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the General Court, have otherwise appropriated them: provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

"The which clearly to determine; SECT. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining shall have propriety to the low water-mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands.

"SECT. 4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. [1641, 47.]" . . .

We have thought it proper to examine, with some care, the foundation, on which the right of property in land, situated between high and

low water-mark in Massachusetts, rests, though it has not been much contested in reference to these harbor lines, except indirectly, and in vague and general terms. And we think it is entirely clear that, since the adoption of the colony ordinance, every grant of land, bounding upon the sea, or any creek, cove, or arm of the sea, and either in terms including flats to low water-mark, or bounding the land granted on the sea or salt water, with no terms limiting or restraining the operation of the grant, and where the land and flats have not been severed by any intervening conveyance, has had the legal effect to pass an estate in fee to the grantee, subject to a limited right of way for boats and vessels. We have seen that the entire right of property in the soil was granted by the charter to the colonists, with a full power of disposal, and that the colonial government was clothed with so much of the royal prerogative and power, as was necessary to maintain and regulate all public rights and immunities in the same. If land so situated had, previously to the ordinance, been conveyed by the government, to companies of proprietors or individuals, the Act was in the nature of a grant of the flats to such prior grantees. It is said that it was not of itself a grant, but a general law affecting the character of property. Be it so. It was an authoritative declaration of owners, having a full right of property and power of disposal, annexing additional land to that previously granted, to hold in fee, subject to a reserved easement; and, if not strictly a grant, it partook of most of the characteristics of a grant, and could not be revoked by the power that gave it. In regard to all grants made by the government after the ordinance, the terms of the grant, bounding the lands granted upon the sea, or arm of the sea, or places where the tide ebbed and flowed, would, *ex vi termini*, carry a fee to low water-mark, or one hundred rods; so that in one or the other alternative, this ordinance must govern and control the shore rights of riparian proprietors in every part of the Commonwealth.

II. Assuming, then, that the defendant was owner in fee of the soil and flats upon which the wharf in question was built, it becomes necessary to inquire whether it was competent for the legislature to pass the Acts establishing the harbor lines, and what is the legal validity and effect of those Acts. . . .

The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the Commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute

and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others, having an equal right to the enjoyment of their property, nor injurious to the rights of the community. {All property in this Commonwealth, as well that in the interior as that bordering on tide-waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. // Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. [P. 704

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same. al. B.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building

for a small-pox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *Sic utere tuo, ut alienum non ledas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers.

These principles were somewhat discussed, and similar views were substantially adopted, in the case of *Commonwealth v. Tewksbury*,¹ 11 Met. 55. Perhaps the facts in that case were imperfectly stated, or some of the positions and illustrations were expressed in too broad and unqualified a manner; but we are of opinion that the principle on which that judgment proceeded was correct. It assumes that all real estate, inland or on the sea-shore, derived immediately or remotely from the government of the State, is taken and held under the tacit understanding that the owner shall so deal with it as not to cause injury to others; that when land is so situated, or such is its conformation, that it forms a natural barrier to rivers or tidal watercourses, the owner cannot justifiably remove it, to such an extent as to permit the waters to desert their natural channels, and overflow, and perhaps inundate fields and villages, render rivers, ports, and harbors shallow, and consequently desolate, and thereby destroy the valuable rights of other proprietors, both in the navigation of the stream, and in the contiguous lands. It expresses nearly the same legal truth, which is expressed in the familiar maxim, that no owner, through whose land a natural watercourse runs, can lawfully divert it to the damage of others. But what is the diversion of a watercourse? Ordinarily, and when no such circumstances exist, the owner of land has a perfect right to use and remove the earth, gravel, and clay of which the soil is composed, as his own interest or convenience may require. But can he do this when the same materials form the natural embankment of a watercourse? He may say, perhaps, that he merely intends to make use of materials which are his own, and to which he has a right, and for which he has other uses. But we think the law will admit of no such excuse; he knows that, when these materials are removed, the water, by the law of gravitation, will rush out,

¹ In this case it was held, in 1846, that a statute of Massachusetts of 1845, imposing a penalty for removing stones, gravel, or sand from any beach in the town of Chelsea, was passed for the purpose of protecting the harbor of Boston, that it applied to the owner of the beach as well as others, and that it was not a taking of property for public use, within the meaning of the Constitution, but a legitimate exercise of legislative power. — Ed.

and all the mischievous consequences of diverting the watercourse will follow. He must be presumed to have intended all the necessary and natural consequences of his own acts; of course, that he intended, by those acts, to divert the watercourse; and the law holds him responsible for them accordingly. Principles are tested by taking extreme cases. Take the case of the river Mississippi, where large tracts of country, with cities and villages, depend for their protection upon the natural river-bank, which is private property. Perhaps, under such circumstances, it might not be too much to say, not only that the owner cannot do any positive act towards removing the embankment, but that he may properly be held responsible for the permissive waste of it, by negligence and inattention. And the other cases hereinbefore stated, though very different in their facts, are similar in principle, all being cases in which the specific use prohibited, is so prohibited because it would be noxious, and cause or threaten damage to the lives, health, comfort, or property of other members of the community, equally entitled to protection. We think, therefore, that that case was rightly decided.

Supposing the principle itself to be well established, the great question then is, whether the Act in question, fixing certain harbor lines, was within it; and we are of opinion that it is, although it may in some cases seem to trench somewhat largely on the profitable use of individual property. This opinion is founded on several considerations.

We have already alluded to the point, that a particular use of land, as well inland as on the sea-shore, which, in one situation, would be greatly injurious to common and public rights, in another position would be wholly harmless. (A man having a hill of gravel on his farm, not constituting the embankment of a stream, may remove the earth at his pleasure, because such use can injure no one; when under other circumstances, it would be greatly injurious.) Whether any restraint upon the use of land is necessary to the preservation of common rights and the public security, must depend upon circumstances, to be judged of by those to whom all legislative power is intrusted by the sovereign authority of the State, so to declare and regulate as to secure and preserve all public rights.

We think it is a consideration entitled to some weight, that the colony ordinance itself, which changed the tenure and extended the title of riparian proprietors to low water-mark, so as to include the shore, was not absolute and unqualified. It contained a reservation, to the effect that riparian proprietors should not, by this extension of their territorial limits, have power to stop or hinder the passage of boats and vessels, in or through any sea, creeks, or coves, to other men's houses or lands. From these very general words, it is certainly difficult to prescribe exact limits to this reservation. That it was designed to impose some restriction in favor of the right of navigation is quite clear. To say, as it has sometimes been contended, that the reservation was intended to prohibit any restraint upon the pre-existing right of navigation, and

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that all persons should have the same right of passing over it, with boats and vessels, as they had before, would seem to restrain any building thereon, and to render the Act nugatory and of no practical effect. Besides, if the purpose was, as it has often been declared to be, to enable proprietors bounding on the shore to erect and build quays, wharves, and warehouses thereon, for purposes incident to the great interests of commerce and navigation, such a construction of the Act would defeat the purposes for which it was designed.

Again, the construction which has been put upon this Act, in all the judicial decisions which have been made upon it, many of which are cited in the former part of this opinion, has been, that, notwithstanding the Act vests a fee in the soil in the riparian proprietor, analogous to the *jus privatum*, or right of property, which at the common law the Crown could grant to a subject, yet that the land between high water and low water, until it was enclosed, built upon, or so occupied by the riparian proprietor, so far partook of its original character, that whilst covered by the tide-water the public and all persons might lawfully use it, might sail over it, anchor upon it, fish upon it, and by so doing no person should be held to commit a trespass, or dispossess the owner, or take adverse possession. The public used only a common right, by so using these lands when covered with tide-water.

In putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to every part of it. Looking at the terms of this law, and the purposes for which it was intended, the object seems to have been, to secure to riparian proprietors in general, without special grant, a property in the land, with full power to erect such wharves, embankments, and warehouses thereon, as would be usually required for purposes of commerce, subordinate only to a reasonable use of the same, by other individual riparian proprietors and the public, for the purposes of navigation, through any sea, creeks, or coves, with their boats and vessels. . . .

But the use which we think may be justly made of these principles, and of these views of the law of England, as it had existed long anterior to the emigration of our ancestors to America, is this: They had been accustomed to regard the use of the sea-shores, for navigation and fishing, as *publici juris*, to be held and regulated for the common and general benefit; and this, although in many cases the right of soil was vested by private grant in an individual. They had long been familiar with the practice of the Crown to make grants of the *jus privatum*, or right of property in the soil, in the sea-shore over which the tide ebbed and flowed, which would warrant the grantee of the Crown in erecting thereon wharves, quays, and warehouses, for facilitating navigation and commerce, provided such erections did not hinder or obstruct navigation, or become a nuisance. If such a wharf or other erection were such as to interfere essentially with the common right of navigation, it would be held by the common law to be a common nuisance, and could

not be justified, even by the king's grant, unless sanctioned by an Act of Parliament. These rules and practices were familiar to the minds of our English ancestors at their emigration, and we may presume that the colonial government had them in view when, by a general Act, it annexed the sea-shore to the upland, and made it the private property of the riparian proprietor. It must have well understood that all estate granted by the government to individuals is subject, by reasonable implication, to such restraints in its use, as shall make the enjoyment of it by the grantee consistent with the equal enjoyment by others, of their several and common rights. When therefore the government did, by such general Act, grant a right of separate property in the soil of the sea-shore, to enable the riparian proprietor to erect quays and wharves for a better access to the sea, and by the same Act reserved some right to individuals and the public of passing and repassing with vessels, but without defining it, it seems just and reasonable to construe such reservation much more liberally in favor of the right reserved, than it otherwise would be under other circumstances.

And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to apply more significantly and more directly to real estate thus situated on the sea-shore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right. The circumstances are different. In respect to land lying in the interior, and used for agricultural purposes, there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious. But the circumstances are entirely different in regard to the sea-shore, which lies between the sea, admitted to be common to all, and the use of which is of vast importance to the public, and ports and places, without access to which, the use of the sea for navigation would be of little value.

Considering, therefore, that all real estate derived from the government is subject to some restraint for the general good, whether such restraint be regarded as a police regulation or of any other character; considering that sea-shore estate, though held in fee by the riparian proprietor, both on account of the qualified reservation under which the grant was made, and the peculiar nature and character, position, and relations of the estate, and the great public interests associated with it, is more especially subject to some reasonable restraints, in order that the exercise of full dominion over it, by the proprietor, may not be noxious to others, and injurious to the public, the court are of opinion that the legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.

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Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades; and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties.

This principle of legislation is of great importance and extensive use, and lies at the foundation of most enactments of positive law, which define and punish *mala prohibita*. Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known, and authoritative rule which all can understand and obey. In the case already put, of erecting a powder magazine or slaughter-house, it would be indictable at common law, and punishable as a nuisance, if in fact erected so near an inhabited village as to be actually dangerous or noxious to life or health. Without a positive law, everybody might agree that two hundred feet would be too near, and that two thousand feet would not be too near; but within this wide margin, who shall say, who can know, what distance shall be too near or otherwise? An authoritative rule, carrying with it the character of certainty and precision, is needed. <The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance; builders of houses need to know, to what distance they must keep from the obnoxious works already erected, in order to be sure of the protection of the law for their habitations.> This requisite certainty and precision can only be obtained by a positive enactment, fixing the distance, within which the use shall be prohibited as noxious, and beyond which it will be allowed, and enforcing the rule thus fixed, by penalties.

Many cases will suggest themselves, where the legislature interposes by statute to declare, protect, and regulate public rights, although those rights are public easements only, over lands of which the fee of the soil

is in private proprietors. Such are laws regulating the construction and repairs of roads, highways, and bridges; declaring how they shall be graded, what barriers shall be erected to guard travellers against dangerous places, and what obstructions shall be removed. . . .

But in reference to the present case, and to the Act of the Legislature, establishing lines in the harbor, beyond which private proprietors are prohibited from building wharves, it is urged that such a restraint upon the estate of an individual, debarring him to some extent from the most beneficial use of it, is in effect taking his estate. If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable. But we are to consider the subject-matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now, if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the coterminous proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

But of this the legislature must judge. Having once come to the conclusion that a case exists, in which it is competent for the legislature to make a law on the subject, it is for them, under a high sense of duty to the public and to individuals, with a sacred regard to the rights of property and all other private rights, to make such reasonable regulations as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others.

In regard to the case of Mr. Alger, the report states that a certain piece of wharf, called a triangular piece, was erected and placed in its position beyond the line, after the law fixing the line had been passed; but that some other portions, though actually beyond the line, were erected, and the obstructions complained of actually placed in their position, before the law was passed; and also that the wharf complained of does not obstruct the navigation of boats and vessels.

In regard to the first suggestion, it may be necessary to examine the facts more minutely before any final judgment is entered. If any portion of this erection, described in the indictment, had been actually made

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and placed in its position before the Act was passed, the court are all of opinion that the owner is not liable to its penalties. These laws were future and prospective in their terms and in their operation. They proceeded on the assumption, that before they were passed, every man had a right to build on his own flats, if the erection did not in fact operate to impede navigation, and render him indictable as at common law; and that the common law, in thus lending its aid in the prosecution of actual injuries to navigation, to be proved in each case as nuisances, would be sufficient to secure the public against encroachments without legislation. But, for the reasons hereinbefore given, it seems to us highly important to have a more precise and definite law made and promulgated, by which all persons may more certainly know their own and the public rights, and govern themselves accordingly.

If, indeed, before the passing of these laws, any one had so built into navigable water as to cause a public nuisance, he may be liable to indictment and punishment, but not by these laws, fixing harbor lines. It follows, therefore, that all persons who built on their own soil before these laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws, made to punish acts lawful at the time they were done, would be *ex post facto*, contrary to the Constitution and to the plainest principles of justice, and of course inoperative and void.

In regard to the other suggestion, that it is found by the case that the particular wharf of Mr. Alger did not obstruct or impede navigation, it is proper to say, that if we are right in principle, we are bound to hold that this circumstance can afford no defence. A consideration of this fact illustrates the principles we have been discussing. The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide-water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration (the expediency and necessity of defining and securing the rights of the public), which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit.

On the whole, the court are of opinion that the Act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was com-

petent for the legislature to make ; that it was binding on the defendant, and rendered him obnoxious to its penalties, if he violated its provisions.¹

THORPE v. RUTLAND AND BURLINGTON RAILROAD COMPANY.

SUPREME COURT OF VERMONT. 1855.

[27 Vt. 140.]

D. A. Smalley, for the defendants.

J. Macck, for the plaintiff.

[For the statement of facts and the beginning of the opinion, see *ante*, p. 157. The statute in question is given in the note.² The opinion continues as follows:]

REDFIELD, CH. J. . . . II. It being assumed then, that the legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the general range of legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation, it becomes of primary importance to determine the extent to which the charter of a corporation may fairly be regarded as a contract within the meaning of the United States Constitution. . . . [Here the reasoning in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, is stated.]

But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to everything materially affecting their interest, and where there is no express reservation in their charters. It was upon this ground that a perpetual exemption from taxation was claimed in *Providence Bank v. Billings*, 4 Peters, 514, their charter being general, and no power of taxation reserved to the State. The argument was, that the right to tax either their property or their stock was not only an abridgment of the beneficial use of the franchise, but if it existed, was capable of being so exercised as virtually to destroy it. This was certainly plausible, and the court do not deny the liability to so exercise the power of taxation as to absorb the entire profits of the institution. But still they deny the exemption claimed. CHIEF JUSTICE MARSHALL there says:

¹ Compare *Grand Rapids v. Powers*, 89 Mich. 94; *Summerville v. Pressley*, 33 So. Ca. 56 (1890); *St. Louis v. Hill*, 22 S. W. Rep. 861 (1893). — Ed.

² The statute is as follows: "Each railroad corporation shall erect and maintain fences on the lines of their road, . . . and also construct and maintain cattle-guards at all farm and road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon, if occasioned by want of such fences and cattle-guards." — Comp. Stat. 200, § 41.

"The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

This is sufficiently explicit, and upon examination will be found, I think, to have placed the matter upon its true basis. In reason, it would seem that no fault could be found with the rule here laid down by the great expounder of American constitutional law. As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground. And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.

To apply this rule to the present case, it must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the legislature, and cannot be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States Constitution. And if we suppose the legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do (*Moor v. Veazie*, 32 Maine, 343; s. c. in error in the Sup. Ct. U. S., 4 Peters, 565), it would scarcely be supposed that they thereby parted with any general legislative control over such person, or the business secured to him. Such a supposition, when applied to a single natural person, sounds almost absurd. But it must, in fact, be the same thing when applied to a corporation, however extensive. In either case, the privilege of running the road, and taking tolls, or fare and freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would no doubt be void. But beyond that, the entire power of the legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation, in consideration of a share of the profits, or a bonus, or the public duties assumed. And it has been questioned how far one legislature could, in this manner, abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. *Brewster v. Hough*, 10 New Hamp. 138; *Mechanics' and Traders' Bank v. Debolt*, 1 Ohio St. 591; *Toledo Bank v. Bond*, *Ibid.*, 622. It seems to me there is some ground to question the right of the legislature to extinguish, by one act, this essential right of sovereignty. I would not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. *State of New Jersey v. Wilson*, 7 Cranch, 164; reaffirmed in *Gordon v. Appeal Tax Court*, 3 Howard, 133. But all the decisions in the United States Supreme Court, allowing the legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and in the case of corporations, contemporaneous with the creation of the fran-

them as you used the Bible, says Thayer.

chise. *Richmond R. Co. v. The Louisa R. Co.*, 13 Howard, 71. Similar decisions in regard to the right of the legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the State, have been made by this court (*Herrick v. Randolph*, 13 Vt. 525); and in some of the other States (*Landon v. Litchfield*, 11 Conn. 251, and cases cited, *O'Donnell v. Bailey*, 24 Miss. 386). But these cases do not affect to justify even this express exemption from taxation being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the State received or stipulated for a consideration.

But in the present case the question arises upon the statute of 1850, requiring all railways in the State to make and maintain cattle-guards at farm-crossings, and until they do so, making them liable for damage done to cattle by their engines, by reason of defect of fences or cattle-guards. The defendant's charter required them to fence their road, but no express provision is made in regard to cattle-guards. There is no pretence of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the Act of Incorporation, unless everything is implied by grant, which is not expressly inhibited, whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted. . . .

But upon the principle contended for in *Providence Bank v. Billings*, *supra*, and sometimes attempted to be maintained in favor of other corporations, most of the railways in this State would be quite beyond the control of the legislature, as well as to their own police, as that of the State generally. For in very few of their charters are these matters defined, or the control of them reserved to the legislature. Many of the charters do not require the roads to be fenced. But in *Quimby v. The Vermont Cent. R. Co.*, 23 Vt. 387, it was considered that the corporation were bound, as part of the compensation to land-owners, either to build fences or pay for them. The same was also held in *Morss v. Boston and Maine R.*, 2 Cush. 536. Any other construction will enable railroad corporations to take land without adequate compensation, which is in violation of the State Constitution, and would make the charter void to that extent. So, too, in regard to farm-crossings, the charters of many roads are silent. And it has been held that the provision for restoring private ways does not apply to farm-crossings. But the railways, without exception, built farm-crossings, regarding them as an economical mode of reducing land damages, and they are now bound to maintain them, however the case might have been if none had been stipulated for, and the damages assessed accordingly. *Manning v. Eastern Counties Railway Co.*, 12 M. & W. 237. So, too, many of the charters are silent as to cattle-guards at road-crossings, but the roads generally acquiesced in their necessity, both for the security of property and persons upon the railroad and of cattle in the

to natural and artificial persons.

highway. For it has been held that this provision is for the protection of all cattle in the highway. *Fawcett v. The York and North Midland R. Co.*, 2 Law & Eq. 289; *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487. Thus making a distinction in regard to the extent of the liability of railways for damages arising through defect of fences, and farm-crossings, and cattle-guards, at those points, and those which arise from defect of fences, and cattle-guards at road-crossings, the former being only for the protection of cattle, rightfully in the adjoining fields, as was held in *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, and the other for the protection of all cattle in the highway, unless, perhaps, in some excepted cases, amounting to gross negligence in the owners. And there can be no doubt of the perfect right of the legislature to make the same distinction in regard to the extent of the liability of railways in the Act of 1850, if such was their purpose, which thus becomes a matter of construction.

But the present case resolves itself into the narrow question of the right of the legislature, by general statute to require all railways, whether now in operation, or hereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. It might be contended that cattle-guards are a necessary part of the fence at all crossings, but that has been questioned, and we think the matter should be decided upon the general ground. It was supposed that the question was settled by this court, in *Nelson v. V. & C. R. Co.*, 26 Vt. 717. The general views of the court are there stated as clearly as it could now be done, but as the general question is of vast importance, both to the roads and the public, and has again been urged upon our consideration, we have examined it very much in detail.

We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the bill of rights of this State, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot, therefore, be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is, of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would.

This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut* | a.
| B.

alienum non lædas, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature is twofold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways. and those upon the continent of Europe. No one ever questioned the right of the Connecticut Legislature to require trains upon all their railroads to come to a stand before passing draws in bridges; or of the Massachusetts Legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

There would be no end of illustrations upon this subject, which, in the detail, are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. *Hege-man v. Western R. Corp.*, 16 Barbour, 353.

2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to virtual destruction by the legislature; and 2. That it is an attempt to control the obligation of one person to another, in matters of merely private concern.

The first point has already been somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use. *Armington v. Barnet*, 15 Vt. 745; *West River Bridge Co. v. Dix*, 16 Vt. 446, s. c. in error in the United States Sup. Ct.; 6 Howard, 507; 1 Shelford (Bennett's ed.), 441, and cases cited.

All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of *Dartmouth College v. Woodward* was decided, and which every well-considered case in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railroads, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. Many analogous subjects may be adduced to show the right of legislative control over matters chiefly of private concern. It was held, that a statute making the stockholders of existing banks liable for the debts of the bank was a valid law as to debts thereafter contracted, and binding to that extent upon all stockholders, subsequent to the passage of the law. *Stanley v. Stanley*, 26 Maine, 191. But where a bank was chartered with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, and a statute of the State subsequently made it unlawful for any bank in the State to transfer by indorsement or otherwise, any bill or note, etc., it was held that the Act was void, as a violation of the contract of the State with the bank in granting its charter. *Planters' Bank v. Sharp*, and *Baldwin v. Payne*, 6 Howard, 301, 326, 327, 332; *Jamison v. Planters' and Merchants' Bank*, 23 Alabama, 168. It is true that any statute destroying the business or profits of a bank, and equally of a railroad, is void. Hence a statute prohibiting banks from taking interest, or discounting bills or notes, would be void, as striking at the very foundation of the general objects and beneficial purposes of the charter. But a general statute reducing the rate of interest, or punishing usury, or prohibiting speculations in exchange or in depreciated paper, or the issuing of bills of a given denomination, or creating other banks in the same vicinity, have always been regarded as valid. And while it is conceded the legislature could not prohibit existing railways from carrying freight or passengers, it is believed that beyond all question, it may so regulate these matters as to impose new obligations and restrictions upon these roads materially affecting their profits, as by not allowing them to run in an unsafe condition, as was held as to turnpikes. *State v. Bosworth*, 13 Vt. 402. But a law allowing certain classes of persons to go toll free is void. *Pingrey v. Washburn*, 1 Aiken, 268. So, too, chartering a railroad along the same route of a turnpike is no violation of its rights (*White River Turnpike Co. v. Vermont Cent. R.*

Co., 21 Vt. 590; *Turnpike Co. v. Railway Co.*, 10 Gill & Johnson, 392; or chartering another railway along the same route of a former one, to whom no exclusive rights are granted in terms. *Matter of Hamilton Avenue*, 14 Barbour, 405; or the establishment of a free way by the side of a toll bridge (*Charles River Bridge v. Warren Bridge*, 11 Peters, 420).

The legislature, may no doubt, prohibit railroads from carrying freight which is regarded as detrimental to the public health or morals, or the public safety generally, or they might probably be made liable as insurers of the lives and limbs of passengers as they virtually are of freight. The late statute giving relatives the right to recover damages where a person is killed, has wrought a very important change in the liability of railways, ten times as much, probably, as the one now under consideration ever could do. And I never knew the right of the legislature to impose the liability to be brought in question.

But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or to be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the State, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the State legislature have created a corporation for manufacturing powder at a given point, at the time, remote from inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed, or secured from doing harm, at the sole expense of such corporation. This very point is, in effect, decided in regard to Trinity churchyard, which is a royal grant for interment, securing fees to the proprietors, in the case of *Coates v. The City of New York*, 7 Cowen, 585; and in regard to *The Presbyterian Church*, in their case *v. The City of New York*, 5 Cowen, 538.

So, too, a statute requiring division fences between adjoining land proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons and equally corporations. But a statute requiring land-owners to build all their fences of a given quality or height, would no doubt be invalid, as an unwarrantable interference with matters of exclusively private concern. But the farm-crossings upon a railway are by no means of this character. They

are division fences between adjoining occupants, to all intents. In addition to this, they are the safeguards which one person, in the exercise of a dangerous business, is required to maintain in order to prevent the liability to injure his neighbor. This is a control by legislative action coming within the obligation of the maxim, *Sic utere tuo*, and which has always been exercised in this manner in all free States, in regard to those whose business is dangerous and destructive to other persons' property or business. Slaughter-houses, powder-mills, or houses for keeping powder, unhealthy manufactories, the keeping of wild animals, and even domestic animals, dangerous to persons or property, have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied.

I do not now perceive any just ground to question the right of the legislature to make railways liable for all cattle killed by their trains. It might be unjust or unreasonable, but none the less competent. *Girtman v. Central Railroad*, 1 Kelly (Georgia), 173, is sometimes quoted as having held a different doctrine, but no such point is to be found in the case. The British Parliament for centuries, and most of the American legislatures, have made the protection of the lives of domestic animals, the subject of penal enactment. It would be wonderful if they could not do the same as to railways or if they could not punish the killing, by requiring them to compensate the owner, or, as in the present case, to do it until they used certain precautions in running their trains, to wit, maintained cattle-guards at roads and farm-crossings.

There are some few cases in the American courts bearing more directly upon the very point before us. In *Suydam v. Moore*, 8 Barbour, 358, the very same point is decided against the railway; Willard, J., compares the requirement to the law of the road, the passing of canal-boats, and keeping lights at a given elevation in steamboats, and says it comes clearly within the maxim *Sic utere tuo*; and in *Waldron v. The Rensselaer & Saratoga R. Co.*, Ibid. 390, the same point is decided, and the same judge says the requirements of the new Act, which is identical with our statute of 1850, as applied to existing railways, "are not inconsistent with their charter, and are, in our judgment, such as the legislature had the right to make." They were designed for the public safety, as well as the protection of property. In *Milliman v. The Oswego & Syracuse R.*, 10 Barbour, 87, the ground is assumed that the new law was not intended to apply to existing roads. And no doubt is here intimated of the right of the legislature to impose similar regulations upon existing railways. The N. Y. Revised Statutes subject all corporate charters to the control of the legislature, but it has

been there considered, that this reservation does not extend to matters of this kind, but that the right depends upon general legislative authority. The case of *The Galena and Chicago Union R. Co. v. Loomis*, 13 Illinois, 548, decides the point that the legislature may pass a law, requiring all railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade. The court say, "The legislature has the power, by general laws, from time to time as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with, or impairs the powers conferred on the defendants in their Act of Incorporation."

All farm-crossings in England are required to be above or below grade, so as not to endanger passengers upon the road, and so of all road-crossings there, unless protected by gates. I could entertain no doubt of the right of the legislature to require the same here as to all railways, or even to subject their operations to the control of a board of commissioners, as has been done in some States. In *Benson v. New York City*, 10 Barbour, 223, it was held, that a ferry, the grant to which was held, not under the authority of the State, but from the city of New York, and which was a private corporation, as to the stock might be required by the legislature to conform to such regulations, restrictions, and precautions as were deemed necessary for the public benefit and security. The opinion of Woodbury, Justice, in *East Hartford v. Hartford Bridge Co.*, 10 Howard, 511, assumes similar grounds, although that case was somewhat different. The case of *Swan v. Williams*, 2 Michigan, 427, denies that railways are private corporations. But that proposition is scarcely maintainable so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be. The language of Marshall, Chief Justice, in *Dartmouth College v. Woodward*, 4 Wheaton, 518, 629, seems pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts: "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." And equally pertinent is the commentary of Parsons on Contracts, 2 vol. 511, upon the provision of the United States Constitution in relation to the obligation of contracts. "We may say that it is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the legislature of a State may at any time deem expedient."

We conclude then, that the authority of the legislature to make the requirement of existing railways may be vindicated, because it comes fairly within the police of the State ; 2. Because it regards the division

fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons.

*Judgment affirmed.*¹

BENNETT, J., dissenting.

WYNEHAMER v. THE PEOPLE.

THE PEOPLE v. TOYNBEE.

NEW YORK COURT OF APPEALS. 1856.

[13 N. Y. 378.]

WYNEHAMER, the defendant in the court below in the case first above entitled, was, in July, 1855, indicted at a court of general sessions, held in and for the county of Erie, for selling intoxicating liquors, contrary to the provisions of the statute entitled "An Act for the Prevention of Intemperance, Pauperism, and Crime."² The indictment

¹ There are some analogous subjects where legislative control has been sustained by the courts which may properly be here alluded to. The expense of sidewalks and curbstones in cities and towns has been imposed upon adjacent lots, chiefly for general comfort and convenience. *Parson v. Sweet*, 1 Green, 196; *City of Lowell v. Hadley*, 8 Metcalf, 180. Unlicensed persons not allowed to remove house-dirt and offal from the streets. *Vandine's Case*, 6 Pick. 187. Prohibiting persons selling produce not raised upon their own farms, from occupying certain stands in the market. *Nightingale's Case*, 11 Pick. 168. See also *Buffalo v. Webster*, 10 Wendell, 99; *Bush v. Seabury*, 8 Johns. 327. Prohibiting the driving or riding horses faster than a walk in certain streets. *Commonwealth v. Worcester*, 3 Pick. 462. Prohibiting bowling-alleys. *Tanner v. The Trustees of the City of Albion*, 5 Hill, 121, or the exhibition of stud horses or stallions in public places. *Nolan v. Mayor of Franklin*, 4 Yerger, 163. The same may be said of all statutes regulating the mode of driving upon the highway or upon bridges, the validity of which have long been acquiesced in.

The destruction of private property in cities and towns, to prevent the spread of conflagrations, is an extreme application of the rule, compelling the subserviency of private rights to public security, in cases of imperious necessity. But even this has been fully sustained after the severest scrutiny. *Hale v. Lawrence*, and other cases upon the same subject; 1 Zabriskie, 714, 3 Zabriskie, 590, and cases there referred to from the New York Reports. There is, in short, no end to these illustrations, when we look critically into the police of the large cities. One in any degree familiar with this subject would never question the right depending upon invincible necessity, in order to the maintenance of any show of administrative authority among the class of persons with which the city police have to do. To such men any doubt of the right to subject persons and property to such regulations as the public security and health may require, regardless of merely private convenience, looks like mere badinage. They can scarcely regard the objector as altogether serious. And generally, these doubts in regard to the extent of governmental authority come from those who have had small experience. [This appears to be the Chief Justice's note. See also *Minneapolis, &c. Ry. Co. v. Emmons*, 149 U. S. 364 (1893). — Ed.]

² The reporter does not give the terms of the statute. The following summary of it is taken from the opinion of A. S. JOHNSON, J., at pp. 406-409: "The sections which

contained several counts, each of which charged in substance that the defendant, on a day subsequent to the 4th of July, 1855, at the city of

particularly relate to it are substantially these, omitting such parts as do not bear upon this case: 'It shall be the duty of every sheriff, under sheriff, deputy sheriff, constable, marshal, or policeman, to arrest any person whom he shall see actually engaged in the commission of any offence in violation of the 1st section of this Act, and to seize all liquor kept in violation of said section, at the time and place of the commission of such offence, together with the vessels in which the same is contained, and forthwith to convey such person before any magistrate of the same city or town, to be dealt with according to law, and to store the liquor and vessels so seized in some convenient place, to be disposed of as hereinafter provided. It shall be the duty of every officer by whom any arrest and seizure shall be made, under this section, to make complaint on oath against the person arrested, and to prosecute such complaint to judgment and execution.' — Laws of 1855, p. 340, § 12. 'All liquors and vessels in which they are contained, which shall have been found and seized in the possession of any person who shall have been arrested for violating any provision of the 1st section and not claimed by any other person, shall, upon conviction of such person of such offence, be adjudged forfeited.' § 13. When any liquor seized under any provision of the Act shall be adjudged forfeited, as provided in any section of the Act, it shall be the duty of the magistrate (after the determination is become final) forthwith to issue a warrant commanding that the liquor be destroyed. The officer to whom the warrant shall be delivered is to destroy it and make a return of the destruction, and then an execution is to be issued to sell the vessels which contained the liquor. § 10. Every justice of the peace, police justice, county judge, city judge (certain other officers in New York), and in all cities where there is a recorder's court, the recorder, has power to issue process, to hear and determine charges, and punish for all offences under the Act, and to hold courts of special sessions for the trial of such offences. The section proceeds: 'Such court of special sessions shall not be required to take the examination of any person brought before it upon charge of an offence under the Act, but shall proceed to trial as soon thereafter as the complainant can be notified.' Power to adjourn, for good cause, is given for not exceeding twenty days. At the time of joining issue, and not after, either party may demand trial by jury, in which case the magistrate is to cause a jury to be summoned and empanelled, as in other criminal cases in courts of special sessions. § 5. No person who shall have been convicted of any offence against any provision of the Act, or who shall be engaged in the sale or keeping of intoxicating liquors, contrary to the Act, shall be competent to act as a juror upon any trial under any provision of the Act. § 16. Upon the trial of any complaint under the Act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale. § 17. A violation of any provision of the 1st section is made a misdemeanor. The guilty party is to forfeit all liquors kept by him in violation of the section, and is to be further punished by a fine of \$50 for the first offence; for the second, by a fine of \$100 and thirty days' imprisonment; for the third and every subsequent offence, by a fine not less than \$100, nor more than \$250, and by imprisonment for not less than three, nor more than six months. The defendant is likewise to pay all costs and fees provided in the Act; and in default of payment of any such fine, costs, and fees, or any part thereof, the defendant is to be committed until the same are paid 'not less than one day per dollar of the amount unpaid.' § 4. . . .

"The prohibitory clause itself, upon which these proceedings are founded, constitutes the 1st section. Omitting certain exceptions from the prohibition, which will be afterwards noticed, it provides that intoxicating liquor shall not be sold, or kept for sale, or kept with intent to be sold, by any person, in any place whatsoever; that it shall not be given away, nor be kept with intent to be given away, in any place whatsoever, except in a dwelling-house, in no part of which any tavern, store, grocery, shop, boarding-house or victualling-house, or room for gambling, dancing, or other public amusement or recreation of any kind is kept; that it shall not be kept or deposited in

Buffalo, wilfully and unlawfully and contrary to the form of the statute, sold to persons unauthorized by law to sell intoxicating liquor to the jury unknown, intoxicating liquor, to wit, a gill each of rum, brandy, gin, wine, whiskey, and strong beer, without having filed in the office of the clerk of the county of Erie any undertaking approved by the county judge of that county, according to the provisions of the 2d section of the Act. It was further alleged in each count of the indictment that the liquor so sold was not alcohol manufactured by the defendant, or pure wine manufactured by him from grapes grown by himself; and that the sale of the liquor was not authorized, nor was any right to sell the same given by any law or treaty of the United States. The defendant pleaded not guilty; and the issues were tried in the court of general sessions by a common-law jury duly empanelled. On the trial the counsel for the people gave evidence tending to prove that after the 4th day of July, 1855, and before the finding of the bill of indictment, the defendant on several occasions had sold and delivered to different persons at his bar, in Buffalo, brandy, in quantities less than a pint, which was drank on his premises. When the people rested, the counsel for the defendant requested the court to discharge the defendant, or to direct the jury to render a verdict of not

any place whatsoever, except in such a dwelling-house as is above described, or for sacramental purposes in a church or place of worship; or in a place where either some chemical, or mechanical, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business, or while in actual transportation from one place to another, or stored in a warehouse prior to its reaching the place of its destination. By an exception in this same section, liquor may be given away as a medicine by physicians pursuing the practice of medicine as a business, or for sacramental purposes. The section concludes with a provision that it shall not apply to liquor, the right to sell which in this State is given by any law or treaty of the United States.

"By §§ 2 and 3, persons answering the description, doing the acts, and taking the oaths prescribed therein, may be licensed to keep for sale, and sell intoxicating liquor and alcohol for mechanical, chemical, or medicinal purposes, and wine for sacramental use. By § 22, the Act is not to be construed to prevent the sale of cider in quantities not less than ten gallons; nor to prevent the manufacturer of alcohol, or of pure wine from grapes grown by him, from keeping or from selling such alcohol or wine, nor the importer of foreign liquor from keeping or selling the same in the original packages to any person authorized by the Act to sell such liquors; nor to prohibit the manufacture or keeping for sale, nor the selling burning fluids of any kind, perfumery, essences, drugs, varnishes, nor any other article which may be composed in part of alcohol or other spirituous liquors, if not adapted to use as a beverage, or in evasion of this Act.

"The foregoing clauses contain, in substance, the prohibition of the Act, with the exceptions which qualify its effect.

"Two other provisions are necessary to be quoted, as they bear upon the rights which the owner of liquor has in it, and the modes in which he may assert those rights. The first is at the close of § 16, and declares 'that no person shall maintain an action to recover the value or possession of any intoxicating liquor sold or kept by him, which shall be purchased, taken, detained, or injured by any other person, unless he shall prove that such liquor was sold according to the provisions of the Act, or was lawfully kept and owned by him.' The other clause is at the end of § 25, and provides that 'all liquor kept in violation of any provision of the Act shall be deemed and is hereby declared to be a public nuisance.'—ED.

guilty, on the following grounds, *viz.*: 1. That it was not shown that any offence had been committed by the defendant; 2. That it did not appear but that the liquor alleged to have been sold was liquor, the right to sell which was given by laws or treaties of the United States, nor but that it was imported by defendant from foreign countries in pursuance of the United States laws; 3. That the 1st and 4th sections of the aforesaid Act were respectively in violation of the constitutions of the United States and of this State, and void; 4. That the said Act was unauthorized by and in conflict with the laws and treaties of the United States and the Constitution of this State, and therefore void; 5. That it was not shown but that the liquor alleged to have been sold by the defendant was authorized to be sold by the Act of the Legislature above referred to. The court overruled each of the objections, and decided that the case must be submitted to the jury, and the counsel for the defendant excepted. Thereupon the counsel for the defendant offered to prove that the liquor alleged to have been sold was imported into this State from a foreign country, under and in pursuance of the revenue laws of the United States, and that the legal duties thereon were paid; that the defendant purchased such liquor from the importers in the package in which it was imported; and that it was drawn from such package and sold to the persons and at the times proved by the witnesses for the prosecution. The counsel for the people admitted the truth of the facts so offered to be proved, but objected to their admissibility as evidence, on the ground that they were irrelevant and immaterial. The court so held and excluded the evidence, and the defendant's counsel excepted. The counsel for the defendant also offered to prove that the liquor sold by the defendant was owned and possessed by him previous to and on the 3d of July, 1855; the counsel for the people admitted the fact to be so, but objected to it as evidence on the ground that it was immaterial. The objection was sustained, and the evidence excluded, and the defendant's counsel excepted. At the close of the evidence the counsel for the defendant requested the court to direct the jury to acquit the defendant, on the grounds stated at the close of the evidence for the prosecution. The court declined and the defendant's counsel excepted. The counsel for the defendant also requested the court to charge the jury that the people must prove that the liquor sold by the defendant was intoxicating; the court as to this request charged, that if it was proved that the defendant sold brandy, this was intoxicating liquor within the meaning of the Act; and the defendant's counsel again excepted. The jury found the defendant guilty; and the court sentenced him to pay a fine of fifty dollars, and to be committed until the same was paid. The judgment was affirmed by the Supreme Court sitting in the eighth district. See 20 Barbour, 567. The defendant sued out a writ of error.

Toynbee, the defendant in the case secondly above entitled, was, on the 17th of July, 1855, arrested by Mathews, a police officer of the city of Brooklyn, and brought before a police justice of that city, with-

out any precept for his arrest having been issued. When he brought him before the justice, Mathews made a complaint in writing, verified by his oath, which stated that on the day of the arrest the complainant saw the defendant at a place which was specified, in Brooklyn, sell and keep for sale, and have in his possession, with intent to sell, intoxicating liquors, to wit, brandy and champagne; that the complainant saw the defendant engaged in selling liquor, to wit, brandy, in violation of the Act for the prevention of intemperance, pauperism, and crime; that the offence consisted in selling one glass of brandy and one bottle of champagne; that the complainant had arrested the defendant and brought him before the justice to answer the charge, and to be dealt with according to law; and that at the time and place of the offence, he, the complainant, seized the said brandy and champagne, with the bottles in which they were contained, and had stored them in a convenient place, to be disposed of as provided by the aforesaid Act. The defendant asked to be discharged, on the ground that the Act was unconstitutional, and on the further ground that the complaint did not set forth facts sufficient to constitute an offence by the defendant. His application was denied. He then objected to being tried by a court of special sessions, and offered to give bail for his appearance at the next court having criminal jurisdiction. The justice overruled the objection, refused to take bail, and required the defendant to plead to the charge. The defendant pleaded not guilty, and thereupon the complainant was sworn and testified that the defendant kept a hotel in Brooklyn, in the basement of which he kept a bar-room; that on the 17th of July, he, the witness, saw the defendant sell a glass of brandy and a bottle of champagne, which were intoxicating liquors, and that the defendant kept for sale in his bar-room such liquors. He further testified that the champagne was imported liquor; and that he, the witness, on the occasion aforesaid, seized and took into his possession the bottle of brandy from which the defendant sold, and the bottle of champagne which he had sold and was in the act of delivering. The foregoing is the substance of all the evidence. The court found the defendant guilty of selling and having in his possession with intent to sell, intoxicating liquors, as charged in the complaint, adjudged him guilty of a misdemeanor, and sentenced him to pay a fine of \$50, and \$5.87 costs of the proceedings, and that he be imprisoned until the same were paid, not exceeding fifty-six days. The court further adjudged that the liquor seized be forfeited, and that a warrant for its destruction be issued. On appeal by the defendant, the judgment was reversed by the Supreme Court at a general term in the second district. See 20 Barb. 168. The people appealed to this court. . . .

A. J. Parker, for the plaintiff in error, in the case first entitled.

A. Sawin, for the people.

J. M. Van Cott, for the people, in the case secondly entitled.

John A. Lott, for the defendant. . . .

HUBBARD, J. The first ground assumed by the appellant's [Toyn-

bee's] counsel on the argument was, that the sale of imported liquor in a less quantity than the package of importation was contrary to the provisions of the Act under which the defendant was convicted. This is clearly a tenable position. In the view which I take of the law in this case, it is not very essential that this proposition be considered at much length. . . .

The Act in question, by the exception alluded to, expressly refrains from all interference with the operation of the laws of Congress or with the right of sale of the importer as above stated, and hence is not obnoxious to the objection I am considering.¹

The next question to be considered relates to the prohibitory character of the law, and its vindictory provisions as it respects existing rights of property in liquor at the time the Act took effect. This is purely a question of legislative power, under the fundamental law. It is needless to say that the courts have no concern with the wisdom or expediency of the enactment to accomplish the beneficent ends indicated by the title. The policy of this government, from its foundation, certainly vindicates the political necessity and economy of stringent laws circumscribing the sale of spirituous liquors. I entertain no doubt of the constitutional competency of the legislature to prohibit entirely the commerce, within the State, in liquor as a beverage, by laws prospective in their operation. If, in the judgment of the legislature, the public welfare required it, the future production, manufacture, or acquisition of liquor might be prohibited. The sovereign power of the State in all matters pertaining to the public good, the health, good order, and morals of the people, is omnipotent. Laws intended to promote the welfare of society are within legislative discretion, and cannot be the just subject of judicial animadversion, except when it is seen that the constitutional guarantees of private property have been invaded. The police power is, of necessity, despotic in its character, commensurate with the sovereignty of the State; and individual rights of property, beyond the express constitutional limits, must yield to its exercise. And in emergencies, it may be exercised to the destruction of property, without compensation to the owner, and even without the formality of a legal investigation. It is upon this principle that health and quarantine laws are established; that a building is blown up to arrest a conflagration in a populous town; that the public market is purged of infectious articles; that merchandise on ship-board, infested with pestilence, is cast into the deep, and public nuisances are abated. It is the public exigency which demands the summary destruction, upon the maxim that the safety of society is the paramount law. It is the application of the personal right or principle of self-preservation to the body politic. I know of no limits to the exercise of the police power vested in the legislature, except the restrictions contained in the written constitution. Under our system of government, with co-or-

¹ See *Brown v. Md.*, 12 Wheat. 419. — ED.

dinate branches, each independent within its sphere, and all deriving their powers from a common source, the fundamental law, one cannot exercise a supremacy over the other, except as it finds its warrant for it in that law. The judiciary possesses no legitimate authority over Acts of the Legislature, aside from the constitutional grant; and even this authority is exercised in an indirect manner, when its powers are appealed to, to carry a statutory law into effect; and then only as it respects the individual rights of property or person.

It is said that this idea of the omnipotency of the legislature, aside from the express constitutional restrictions, is a fallacy. It is conceded that all power emanates from the people, and that the written Constitution clothes the legislature with all the power it possesses. But the grant of power in that instrument is general, of all the legislative power of the State; what this is precisely, is not and cannot well be defined. Aside from the express limitations, it is believed to embrace all the common-law power which the legislature would have possessed had the fundamental law remained, as in England, a part of the unwritten law of the State. This is by no means an alarming proposition. The Declaration of Rights, forming the guarantee of personal liberty and property in the first article of the Constitution, when construed according to its full spirit and intent, is quite ample to protect the citizen against the unauthorized encroachments of the legislature; to protect against all sumptuary laws and laws of kindred character, which have not the public good for their object. I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside the Constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the Constitution itself. This is hostile to the theory of the government. The Constitution is the only standard for the courts to determine the question of statutory validity.

There is no constitutional restriction upon the power of the legislature in the regulation of the sale or traffic in intoxicating drinks, whether affecting existing rights of property in liquor or not. As a scheme of regulation, the degree of the limitation of the sale or traffic is a matter of legislative discretion. The fault of the present law is, that it does not profess to be a scheme of regulation. There is no attempted discrimination between liquor owned at the time the law took effect and that acquired afterwards. I have reflected with much attention to see whether the courts could not make the discrimination, for instance, as a question of fact, to be ascertained in a given case, but I have encountered the insurmountable difficulty, that the legislature plainly intended that there should be no such distinction. No defence on a trial could be admitted on such ground, for the reason that it would be against the manifest policy of the Act. It is the intent of the statute alone which the courts are authorized to execute.

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This is the point, and it is vital. Stat. passed April 9-18. It was to take effect.

on 1st of July following 1843 N.Y. Does a statute which is not to take effect for 3 months and impairs the entire saleability of liquor, save

the statute now being read. The opinion may well be given
if it might say so. It gives the owner 3 months in
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The prohibitory feature of the law must, therefore, be regarded as extending to all liquor in the State at the time the Act took effect. In this aspect I will, in a few words, give my views of its unconstitutionality as it respects vested rights of property in liquor, under the organic law, which forbids the citizen being deprived of his property without due process of law. That liquor is recognized by the law as property, that the Constitution knows no distinction in its guarantees of the rights of property of all kinds, that the constitutionality of the law is to be tested the same as though it related to some other and perhaps better species of property, is not questioned. The Constitution surrounds liquor, as property, with the same inviolability as any other species of property. There can be no room, I think, for difference of opinion as to the meaning of the phrase, "due process of law," as used in the Constitution. It means an ordinary judicial proceeding. In a criminal case, an arraignment, formal complaint, confronting of witnesses, a trial, and regular conviction and judgment. When a forfeiture of property is made a part of the punishment, as in this case, the judgment embracing it would, in its effect, deprive the offender of his property in the constitutional method. I think it competent for the legislature to declare a forfeiture of liquor, which an offender may have in possession, as a mode of punishment; and if the law in question was in other respects constitutional, I should uphold the judgment of forfeiture in this case as entirely proper. But the portion of the law which authorizes the seizure and destruction of liquor, where the prosecution or conviction of the owner is not contemplated, I should not hesitate to pronounce void, as property is thus destroyed or the citizen deprived of it without process of law. It is not pretended, nor can it be, that property which is not *per se* a nuisance can be annihilated by force of a statute alone, or by proceeding *in rem* for the punishment of a personal offence. Liquor is not a nuisance *per se*, nor can it be made so by a simple legislative declaration. It does not stand in the category of common nuisances which of themselves endanger the welfare or safety of society. It is its use and abuse as a beverage which gives it its offensive character. Otherwise it is entirely inoffensive. In my judgment, therefore, it cannot be confiscated to prevent its misuse, except through a prosecution against the owner *in personam*.

But it is said that this law does not assume to deprive any one of his property in liquor; that the owner is allowed to retain the unmolested custody and personal use of it, according to his pleasure. It is true that the owner may not be molested in this enjoyment, provided he keeps it in his dwelling-house, if fortunate enough to possess a domicile. I apprehend that by a fair construction of the law he is forbidden, under a severe penalty, from keeping it elsewhere, except for mechanical and other specified uses, although innocent of any intent to sell. I have examined the 1st section of the law with care, to see if it could not be construed in such manner as to make the keeping in any place except a dwelling-house, criminal only when accompanied

with an intent to sell. But the section cannot be so construed. The language is too clear to admit of a doubt as to the intention of the legislature. The keeping or deposit in any place, except in a dwelling-house, or place where some trade or business is carried on requiring its use, is prohibited, and by the 4th section of the Act such keeping or deposit is a crime. This, certainly, is a most extraordinary provision, which must have the effect to render a person a criminal who was so unfortunate as to have a quantity of liquor on hand in a forbidden place at the time the law took effect, although he had no intent to violate the law by selling. A person thus circumstanced would have but one of two alternatives to avoid criminality, either just before the law took effect to remove the liquor to a dwelling-house, or to a shop for mechanical and other prescribed uses, or destroy it with his own hand. I can scarcely credit that the legislature designed the law to have this effect; but no other construction can be put upon the language of the 1st section of the law, and we are bound to suppose, judicially, that the legislature intended what their words import.

The law does not even countenance the exportation of the liquor after it took effect. The plain design of the law seems to have been to cut off the liquor itself, to insure its destruction, by circumscribing the keeping of it, and authorizing its seizure, if kept in a forbidden place, or with a criminal intent to sell. The entire right of sale, within the State at least, is prohibited, and in this, in my judgment, consists the error of the law as it respects liquor owned when the law went into operation. If there had been any right of sale within the State preserved, for instance, to a licensed vendor, although of minor importance, it would have been sufficient, perhaps, to have impressed the law with a character of regulation, and saved its validity.

But the abolition of all right of sale in the State is equivalent to and is a substantial deprivation of the owner of his property. The right of sale is of the very essence of property in any article of merchandise; it is its chief characteristic; take away its vendible quality and the article is practically destroyed. As applied to merchandise of any description, this effect can be judicially seen. Even if the law allowed exportation, that would be of such minor importance as not to save the law from the charge of effectually depriving the owner of his property in the liquor. It is but of trifling value after the entire domestic market is closed against it.

I am unable, therefore, to avoid the conclusion that the prohibition in the 1st section of the law is invalid, inasmuch as it makes no discrimination, nor allows the courts to make any, but extends to all liquor, irrespective of the time of its acquisition; and that, by closing the domestic or State market, it in effect substantially deprives the owner of liquor, acquired before the law took effect, of his vested right of property therein, without due process of law.

At the trial before the police justice, the defendant offered bail for his appearance before a higher court having criminal jurisdiction. It was an error for the court to refuse to receive it. I am well satisfied

that the defendant had a constitutional right to be tried by a common-law jury of twelve men, and that to this end he should have been allowed to give bail to appear before a tribunal where such a jury could be obtained. . . .

I am of the opinion, therefore, that the judgment of the Supreme Court ought to be affirmed. . . .

[Other opinions are reported, by COMSTOCK, A. S. JOHNSON, SELDEN, MITCHELL, and T. A. JOHNSON, JJ., and a brief summary of an opinion by DENIO, C. J. The reporter then adds the following statement:]

On deciding these cases, the court passed upon and affirmed the following propositions:

1. That the prohibitory Act, in its operation upon property in intoxicating liquors existing in the hands of any person within this State when the Act took effect, is a violation of the provision in the Constitution of this State which declares that no person shall be "deprived of life, liberty, or property, without due process of law." That the various provisions, prohibitions, and penalties contained in the Act do substantially destroy the property in such liquors in violation of the terms and spirit of the constitutional provision.

2. That inasmuch as the Act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based upon the distinction referred to, it cannot be sustained in respect to any such liquor, whether existing at the time the Act took effect or acquired subsequently; although all the judges were of opinion that it would be competent for the legislature to pass such an Act as the one under consideration (except as to some of the forms of proceeding to enforce it), provided such Act should be plainly and distinctly prospective as to the property on which it should operate.

3. That the criminal proceeding in a court of special sessions authorized by the said Act is unconstitutional and void because the accused is thereby deprived of the right of trial by jury, guaranteed by the Constitution.

DENIO, C. J., A. S. JOHNSON, COMSTOCK, SELDEN, and HUBBARD, Js., concurred in the foregoing propositions.

MITCHELL, J., dissented from the first and second, and concurred in the third.

T. A. JOHNSON and WRIGHT, Js., dissented from all of them.

All the judges, except T. A. JOHNSON, WRIGHT, and MITCHELL, were in favor of reversing the judgment of the Supreme Court, and of the court of general sessions in the case of Wynehamer.

All the judges, except T. A. JOHNSON and WRIGHT, were in favor of affirming the judgment of the Supreme Court, which reversed that of the court of special sessions in the case of Toynbee.

*Judgments accordingly.*¹

¹ Compare *State v. Gilman*, 33 W. Va. 146 (1889). — ED.

liable for results of sales made in that prop. Such a statute is valid.

BERTHOLF v. O'REILLY.

NEW YORK COURT OF APPEALS. 1878.

[74 N. Y. 509.]

Congress might
prohibit sale to
immatured
Englishman.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 8 Hun, 16.)

The nature of the action and the facts are set forth sufficiently in the opinion.

Lewis E. Carr, for appellant.

W. J. Groo, for respondent.

ANDREWS, J. . . . This action is brought by the plaintiff against the defendant, as the landlord of hotel premises, let with knowledge that intoxicating liquors were to be sold therein by the lessee, to recover the value of a horse owned by the plaintiff, which died in consequence of having been overdriven by the plaintiff's son while in a state of intoxication, produced in part by liquor sold him by the lessee at his bar on the leased premises. . . .

All the elements of the landlord's liability under the Act [the Civil Damage Act of April 29, 1873] exist in this case, *viz.*: the leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant, producing intoxication; and the act of the intoxicated person, causing injury to the property of the plaintiff.

The question we are now to determine is whether the legislature has the power to create a cause of action for damages, in favor of a person injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon.

To realize the full force of this inquiry it is to be observed that the leasing of premises to be used as a place for the sale of liquors is a lawful act, not prohibited by this or any other statute. The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful, that is, whether it was authorized by the license law of the State, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling the liquor. Although the person to whom liquor is sold is at the time apparently a man of sober habits and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out that the liquor sold causes or contributes to the intoxication of the person to whom the sale or gift is made, under the influence of which he commits an injury to person or property, the seller and his

landlord are by the Act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability. The statute imposes upon the dealer and the landlord the risk of any injury which may be caused by the traffic. It cannot be denied that the liability sought to be imposed by the Act is of a very sweeping character and may, in many cases, entail severe pecuniary liability, and its language may include cases not within the real purpose of the enactment. The owner of a building who lets it to be occupied for the sale of general merchandise, including wines and liquors, may, under the Act, be made liable for the acts of an intoxicated person, where his only fault is that he leased the premises for a general business, including the sale of intoxicating liquors, in the same way as other merchandise. The liability is not restricted to the results of intoxication from liquors sold or given away to be drank on the premises of the seller. There is no way by which the owner of real property can escape possible liability for the results of intoxication where he leases or permits the occupation of his premises, with the knowledge that the business of the sale of liquors is to be carried on on the premises, whether alone or in connection with other merchandise, or whether they are to be sold to be drank on the premises or to be carried away and used elsewhere. His only absolute protection against the liability imposed by the Act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors.

The question whether the Act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. . . .

There are two general grounds upon which the Act in question is claimed to be unconstitutional; *first*, that it operates to restrain the lawful use of real property by the owner, inasmuch as it attaches to the particular use a liability, which substantially amounts to a prohibition of such use, and, as to the seller, imposes a pecuniary responsibility, which interferes with the traffic in intoxicating liquors, although the business is authorized by law; and *second*, that it creates a right of action unknown to the common law, and subjects the property of one person to be taken in satisfaction of injuries sustained by another remotely resulting from an act of the person charged, which act may be neither negligent or wrongful, but may be, in all respects, in conformity with law. The Act, it is said, in effect authorizes the taking of private property without "due process of law," contrary to article 1, section 6, of the Constitution, and is also a violation of the first section of the same article, which declares that "no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any of the citizens thereof, unless by the law of the land or the judgment of his peers." If the Act is "due process of law," within the sixth section of the first article, it is manifest that it is valid within the other section to which reference is made.

The right of the State to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication.

The licensee, by accepting a license and acquiring thereby a privilege from the State to engage in the traffic, a privilege confined to those who are licensees and withheld from all other citizens, takes it subject to such conditions as the legislature may attach to its exercise. He consents to be bound by the conditions when he accepts the license, and the State is the sole judge of the reasonableness of the conditions imposed. And the power of the legislature, as a part of the excise system, to impose the liabilities, imposed by the Act in question, upon licensed dealers, as a condition of granting the license, cannot, we think, be questioned. . . .

The Act of 1873 cannot, however, be sustained in all its aspects upon the theory that the liability imposed by the Act is a condition of a privilege granted by the State. This cannot be affirmed in respect of the liability of the landlord, whose right to lease his property belongs to him, as an incident to ownership. The responsibility imposed is not confined to cases of unlawful sales of liquors or to sales made by licensed vendors. Any person selling or giving away liquor, which causes intoxication and consequent injury, is made liable under the Act.

The broad question is presented, whether the Act transcends the limits of legislative power, in subjecting a landlord to liability, under the circumstances mentioned in the Act. Does the Act, in effect, deprive him of his property without "due process of law," in the sense of the Constitution. If the Act can be sustained as to the landlord, it is clearly valid as to all other persons; and its validity as to the landlord is the question directly presented in this case.

We need not enter into any elaborate discussion of the meaning of the words "due process of law." This has been done in numerous judicial decisions. They are held, under the liberal interpretation given to them, to protect the life, liberty and property of the citizens against acts of mere arbitrary persons, in any department of the government. Denio, J., in *Westervelt v. Gregg*, 12 N. Y. 212. These are the fundamental civil rights, for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the constitutional guarantee. In judicial proceedings, due process of law requires notice, hearing and judgment; in legislative proceedings, conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments. It is as

difficult, as it would be unwise to attempt an exact definition of their scope. Their application, in a particular case, must be determined when the question arises, and, in the absence of exact precedents, courts must determine the question, upon a consideration of the general scope of legislative power, the practice of governments, and in view of the conceded principle that individual rights may be curtailed and limited to secure the public welfare and the equal rights of all. . . .

If the legislature was impotent to deal with the traffic in intoxicating liquors or powerless to restrain or regulate it in the interest of the community at large, because legislation on the subject might, to some extent, interfere with the use of property or the prosecution of private business, the legislature would be shorn of one of its most usual and important functions. But, as we have said, the right of the legislature to regulate the traffic is shown by the uniform practice of the government. (It may not only regulate, but it may prohibit it. This was declared after solemn argument and mature deliberation, in one of the propositions adopted by this court in *Wynehamer v. The People*, subject only to the qualification that the prohibition shall not interfere with vested rights of property.) The same principle was declared in the case of *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; and that the legislative power extends to the entire prohibition of the traffic has been recently recognized by the Supreme Court of the United States.

It is quite evident that the Act of 1873 may seriously interfere with the profitable use of real property by the owner. This is especially true with respect to a building erected to be occupied as an inn or hotel, and specially adapted to that use, where the rental value may largely depend upon the right of the tenant to sell intoxicating liquors. The owner of such a building may well hesitate to lease his property, when, by so doing, he subjects himself to the onerous liability imposed by the Act. The Act, in this way, indirectly operates to restrain the absolute freedom of the owner in the use of his property, and may justly be said to impair its value. But this is not a taking of his property, within the meaning of the Constitution. He is not deprived either of the title or the possession. The use of his property for any other lawful purpose is unrestricted, and he may let or use it as a place for the sale of liquors, subject to the liability which the Act imposes. The objection we are now considering would apply with greater force to a statute prohibiting, under any circumstances, the traffic in intoxicating liquors, and as such a statute must be conceded to be within the legislative power, and would not interfere with any vested rights of the owner of real property, although absolutely preventing the particular use, *a fortiori* the Act in question does not operate as an unlawful restraint upon the use of property.

That a statute impairs the value of property does not make it unconstitutional. All property is held subject to the power of the State to regulate or control its use, to secure the general safety and the public

welfare. . . . [Here follow quotations from *Com. v. Alger*, 7 Cush. 84, and *Thorpe v. B. & R. R. Co.*, 27 Vt. 140, and statements of *The Slaughter-House Cases*, 16 Wall. 36, and *Munn v. Ill.*, 94 U. S. 113.]

The right of the legislature to control the use and traffic in intoxicating liquors being established, its authority to impose liabilities upon those who exercise the traffic, or who sell or give away intoxicating drinks, for consequential injuries to third persons, follows as a necessary incident. And the Act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offences, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature has done in the Act of 1873. That there is or may be a relation, in the nature of cause and effect, between the act of selling or giving away intoxicating liquors, and the injuries for which a remedy is given, is apparent, and upon this relation the legislature has proceeded in enacting the law in question. It is an extension, by the legislature, of the principle expressed in the maxim, *Sic utere tuo ut alienum non lædas*, to cases to which it had not before been applied, and the propriety of such an application is a legislative and not a judicial question.

It is said that the statute imposes a liability for the consequences of a lawful act. But the legislature, having control of the subject of the traffic in and use of intoxicating liquors, may make such regulations to prevent the public evils and private injuries resulting from intoxication as in its judgment are calculated to accomplish this end. It may prohibit the selling or giving away of liquors, or it may, while not interfering with the liberty of sale or use, guard against the dangers of an indiscriminate traffic, and induce caution, on the part of those who engage in the business, by subjecting them to liabilities for consequential injuries.

The Act of 1873 does not deprive the seller, who is made liable under the Act, of his property, without due process of law. It authorizes it to be appropriated, in the due course of judicial proceedings, for the satisfaction of injuries resulting from intoxication caused by his act. The legislature has said that the seller may be treated as the author of the injuries; and we think this was within the legislative power.

The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any con-

stitutional provision, be made responsible for the tenant's acts connected with the use of the leased property. In *Dobbins v. The United States*, recently decided by the United States Supreme Court, a distillery, with the real and personal property used in connection therewith, had been seized and condemned to be forfeited, for the violation, by a lessee, of certain provisions of the Act of Congress, regulating the business of distilling. No fraud was imputed to the owner of the premises, and he was not charged with any complicity with the tenant in violating the law. The owner objected that his property could not be forfeited for the acts of the tenant, committed without his knowledge or consent. But the court affirmed the decree of condemnation; and, in his opinion, Clifford, J., says: "The legal conclusion must be that the unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner."

Our conclusion is that the Act of 1873 is a constitutional enactment. It is doubtless an extreme exercise of legislative power, but we cannot say that it violates any express or implied prohibition of the Constitution.

There are some subordinate questions presented, as grounds for the reversal of the judgment. They were considered by the General Term, and we concur in its conclusions in respect to them.

The judgment must be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

IN *Gibbons v. Ogden*, 9 Wheat. 1, 209 (1824), MARSHALL, C. J., for the court, said: "Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an Act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an Act of Congress, and deprived a citizen of a right to which that Act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

"This opinion has been frequently expressed in this court, and is

¹ Compare *Howes v. Maxwell*, 157 Mass. 333 — ED.

founded as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

“But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any Act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the Act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”

In *U. S. v. Holliday*, 3 Wall. 407, 416 (1865), it was a question whether an Act of Congress of 1862, forbidding the sale of intoxicating liquor to an Indian under the charge of an agent, anywhere in the United States, was valid. MILLER, J., for the court, in sustaining the enactment, said: “We are not furnished with any argument by either of the defendants on this branch of the subject, and may not therefore be able to state with entire accuracy the position assumed. But we understand it to be substantially this: that so far as the Act is intended to operate as a police regulation to enforce good morals within the limits of a State of the Union, that power belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. (If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State, among its own inhabitants or citizens, and is not within the powers conferred on Congress by the commercial clause.)”

“The Act in question, although it may partake of some of the qualities of those acts passed by State legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be called a regulation of commerce. ‘Commerce,’ says Chief Justice Marshall, in the opinion in *Gibbons v. Ogden*, to which we so often turn with profit when this clause of the Constitution is under consideration, ‘commerce undoubtedly is traffic, but it is something more: it is intercourse.’ The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

See page
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"If the Act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The Act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision.

"Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the Act regulating it unconstitutional?

"In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign States, says, 'The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines.' 'If Congress has power to regulate it, that power must be exercised wherever the subject exists.' It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes."

IN RE RAPIER, PETITIONER. IN RE DUPRÉ, PETITIONER.

SUPREME COURT OF THE UNITED STATES. 1892.

[143 U. S. 110.]

THESE were three applications to this court for leave to file petitions for writs of habeas corpus. Leave was granted, March 9, 1891, and the petitions were made returnable on the third Monday of the next April. They were duly returned, and were, on the 27th of April, assigned for argument at the present term. The prayer in each case was for a discharge from arrest for an alleged violation of the provisions of section 3894 of the Revised Statutes, as amended by the Act of September 19, 1890, 26 Stat. 465, c. 908, generally known as

the Lottery Act. There was an indictment against D for the mailing of a letter concerning the lottery. It was contended that the statutes of Congress

amendment to the Const. which forbids Congress to pass any law abridging the freedom of the press.

the Anti-lottery Act, which is printed in the margin. [It is omitted here.]

Rapier was arrested under an information in the District Court for the Southern District of Alabama.

Dupré was arrested under two indictments in the Circuit Court for the Eastern District of Louisiana.

The charge against Rapier, and against Dupré in one indictment, was the mailing of a newspaper containing an advertisement of the Louisiana Lottery; and in the other indictment against Dupré was for the mailing of a letter concerning it.

As a cause for the issue of the writ Rapier said, in his application: "Your petitioner avers that he is now in the custody of said marshal under or by color of the authority of the United States and in violation of the Constitution of the United States. Your petitioner is advised that the pretended statute under which he is being prosecuted and held is in violation of the Constitution of the United States, and that the said District Court is without jurisdiction in the premises."

Dupré in No. 8 averred that he was "deprived of his liberty under and by color of the authority of the United States and of said court and in violation of the Constitution of the United States and of his rights as a citizen thereof, because he says that he is advised and therefore avers that the statute of the United States under which he is held and being prosecuted upon said indictment is unconstitutional, null and void, and particularly obnoxious to and in violation of the First Amendment to said Constitution, which forbids Congress passing any law abridging the freedom of the press, and that therefore said Circuit Court is and was without jurisdiction in the premises, and he is deprived of his liberty without authority of law."

His petition in No. 9 contained substantially the same averment.

Mr. Hannis Taylor, for Rapier. Mr. James C. Carter and Mr. Thomas Semmes, for Dupré. Mr. Attorney-General and Mr. Assistant Attorney-General Maury, for the United States.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

We are constrained by the circumstances in which we find ourselves placed by the illness and death of Mr. Justice Bradley, to whom the preparation of the opinion in these cases was committed, to waive any elaboration of our views, and confine ourselves to the expression of the general grounds on which our decision proceeds.

These are applications for discharge by writ of habeas corpus from arrest for alleged violations of an Act of Congress, approved September 19, 1890, entitled "An Act to amend Certain Sections of the Revised Statutes relating to Lotteries, and for other Purposes." 26 Stat. 465, c. 908.

The question for determination relates to the constitutionality of section 3894 of the Revised Statutes as amended by that Act. In

Ex parte Jackson, 96 U. S. 727, it was held that the power vested

-esses the power to forbid the use of the mails in aid of the perpetration of a crime or immorality.

Further, the circulation of newspapers is not prohibited but the Govt. declines to become an agent in the circulation of printed

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in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us.

It is argued that in Jackson's case it was not urged that Congress had no power to exclude lottery matter from the mails; but it is conceded that the point of want of power was passed upon in the opinion. This was necessarily so, for the real question was the existence of the power and not the defective exercise of it. And it is a mistake to suppose that the conclusion there expressed was not arrived at without deliberate consideration. It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were intrusted, and that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to

tion is not guided by reason, is not rational in any sense
when the courts could probably interfere.

determine in what manner it will exercise the power it undoubtedly possesses.

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In short, we do not find sufficient grounds in the arguments of counsel, able and exhaustive as they have been, to induce us to change the views already expressed in the case to which we have referred. We adhere to the conclusion therein announced.

The writs of habeas corpus prayed for will therefore be denied, and the rules hereinbefore entered discharged.

UNITED STATES v. DEWITT.

SUPREME COURT OF THE UNITED STATES. 1869.

[9 Wall. 41.]

On certificate of division in opinion between the judges of the Circuit Court for the Eastern District of Michigan; the case being this:

Section 29 of the Act of March 2d, 1867 (14 Stat. at Large, 484), declares,

"That no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale, or offer for sale such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit; and any person so doing, shall be held to be guilty of a misdemeanor, and on conviction thereof by indictment or presentment in any court of the United States having competent jurisdiction, shall be punished by fine, &c., and imprisonment," &c.

Under this section one Dewitt was indicted, the offence charged being the offering for sale, at Detroit, in Michigan, oil made of petroleum of the description specified. There was no allegation that the sale was in violation or evasion of any tax imposed on the property sold. It was alleged only that the sale was made contrary to law.

selling oil within the description, contrary to law. No allegation that the sale was in violation or evasion of any tax imposed on the property sold. Held, no tax being imposed on the oils, the sale was not prohibited. The statute must be held to be a police law.

Certificate of division from Michigan. There is a U.S. A. prohibiting under penalty of fine and imprisonment, the sale of inflammable oils, that was indicted under the statute for Dept. was indicted under the statute for

To this indictment there was a demurrer; and thereupon arose two questions, on which the judges were opposed in opinion.

(1) Whether the facts charged in the indictment constituted any offence under any valid and constitutional law of the United States?

(2) Whether the aforesaid section 29 of the Act of March 2d, 1867, was a valid and constitutional law of the United States?

Mr. Field, Assistant Attorney-General, for the United States.

Mr. Wills, *contra*.

The CHIEF JUSTICE delivered the opinion of the court.

The questions certified resolve themselves into this: Has Congress power, under the Constitution, to prohibit trade within the limits of a State?

That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the Act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

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arrant them in saying it was an appropriate means of laying and collecting taxes.

As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.

The first question certified must, therefore, be answered in the negative.

The second question must also be answered in the negative, except so far as the section named operates within the United States, but without the limits of any State.¹

¹ In the *License Tax Cases*, 5 Wall. 462, 470 (1866). CHASE, C. J., for the court, said: - 0 - use

But if U. S. gives a license to navigate the waters of the coast or a state, as the U. S. have authority to deal with the entire subject then the license is an authority to act. And the states can not interfere with that licensed right.

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abstract. In *Patterson v. Ky.*, 97 U. S. 501 (1878), HARLAN, J., for the court said: "Whether the final judgment of the Court of Appeals of Kentucky denies to plaintiff in error any right secured to her by the Constitution and laws of the United States, is the sole question presented in this case for our determination.

"That court affirmed the judgment of an inferior State court in which, upon indictment and trial, a fine of \$250 was imposed upon plaintiff in error for a violation of certain provisions of a Kentucky statute, approved Feb. 21, 1874, regulating the inspection and gauging of oils and fluids, the product of coal, petroleum, or other bituminous substances. . . .

"The specific offence charged in the indictment was that the plaintiff in error had sold, within the State, to one Davis, an oil known as the Aurora oil, the casks containing which had been previously branded by an authorized inspector with the words 'unsafe for illuminating purposes.' That particular oil is the same for which, in

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¹ In the *License Tax Cases*, 5 Wall. 462, 470 (1866), CHASE, C. J., for the court, said: "This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the Acts of Congress for selling liquor and lottery tickets confer any authority whatever?"

"It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms. . . . But very different considerations apply to the internal commerce, or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. . . . If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution. . . ."

"But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the license shall be subject to no penalties under national law, if he pays it."

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a license does not necessarily confer an authority to carry on the licensed business. Congress has no power to regulate the liquor business in a State where Congress licenses a business. It is a tax and implies that the business shall be subject to no penalties as long as he pays the

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abstract.

IN *Henderson et al. v. Mayor of New York et al.*, 92 U. S. 259 (1875), where on a suit by certain ship-owners to test the validity of a statute of New York relating to foreign immigrants, this statute was declared void, MILLER, J., for the court, said: "In the case of *The City of New York v. Miln*, reported in 11 Pet. 103, the question of the constitutionality of a statute of the State concerning passengers in vessels coming to the port of New York was considered by this court. It

1867, letters-patent were granted to Henry C. Dewitt, of whom the plaintiff in error is the assignee, by assignment duly recorded as required by the laws of the United States. Upon the trial of the case it was agreed that the Aurora oil could not, by any chemical combination described in the patent, be made to conform to the standard or test required by the Kentucky statute as a prerequisite to the right, within that State, to sell, or to offer for sale, illuminating oils of the kind designated.

"The plaintiff in error, as assignee of the patentee, in asserting the right to sell the Aurora oil in any part of the United States, claims that no State could, consistently with the Federal Constitution and the laws of Congress, prevent or obstruct the exercise of that right, either by express words of prohibition, or by regulations which prescribed tests to which the patented article could not be made to conform.

"The Court of Appeals of Kentucky held this construction of the Constitution and the laws of the United States to be inadmissible, and in that opinion we concur.

"Congress is given power to promote the progress of science and the useful arts. To that end it may, by all necessary and proper laws, secure to inventors, for limited times, the exclusive right to their inventions. That power has been exerted in the various statutes prescribing the terms and conditions upon which letters-patent may be obtained. It is true that letters-patent, pursuing the words of the statute, do, in terms, grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others his invention or discovery, throughout the United States and the Territories thereof. But, obviously, this right is not granted or secured, without reference to the general powers which the several States of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police. . . . The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature, are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of the national authorities to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own Constitution. Its action, in those respects, is beyond the corrective power of this court. That the statute of 1874 is a police regulation within the meaning of the authorities is clear from our decision in *United States v. Dewitt*, 9 Wall. 41. . . .

"The Kentucky statute being, then, an ordinary police regulation for the government of those engaged in the internal commerce of that State, the only remaining question is, whether, under the operation of the Federal Constitution and the laws of Congress, it is without effect in cases where the oil, although condemned by the State as unsafe for illuminating purposes, has been made and prepared for sale in accordance with a discovery for which letters-patent had been granted. We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale, within a State, of tangible personal property which that State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits."

Compare *Trade Mark Cases*, 100 U. S. 82.—Ed.

patent right is to be exercised only in subordination to the police regulations of the state.

was an Act passed February 11, 1824, consisting of several sections. The first section, the only one passed upon by the court, required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other State of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States into the port of New York, or into any of the United States, and of all persons landed from the ship, or put on board, or suffered to go on board, any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age, and occupation should be falsely reported.

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Suppose Congress should undertake to exempt a holder of a patent right from the laws of the state. Congress has power to promote progress &c. Is it not promot-
ing science and useful arts to give the patentee an absolute and affirmative right?

If Congress undertook to give such an extended power then there is the case itself does not prevent that right being given.

Congress would have entire power. Thayer. Nothing in scope of decision against it.

After the recess Thayer withdrew the last state-
ment after the recess and said that Congress
could not have the power to exempt a patented
article from taxation because of the way that Congress
must exercise its power - Art II, § 8.

was held valid by the state courts but declared void, as
being unconstitutional, by the U. S. Sup. Ct.

IN *Henderson et al. v. Mayor of New York et al.*, 92 U. S. 259 (1875), where on a suit by certain ship-owners to test the validity of a statute of New York relating to foreign immigrants, this statute was declared void, MILLER, J., for the court, said: "In the case of *The City of New York v. Miln*, reported in 11 Pet. 103, the question of the constitutionality of a statute of the State concerning passengers in vessels coming to the port of New York was considered by this court. It

1867, letters-patent were granted to Henry C. Dewitt, of whom the plaintiff in error is the assignee, by assignment duly recorded as required by the laws of the United States. Upon the trial of the case it was agreed that the Aurora oil could not, by any chemical combination described in the patent, be made to conform to the standard or test required by the Kentucky statute as a prerequisite to the right, within that State, to sell, or to offer for sale, illuminating oils of the kind designated.

"The plaintiff in error, as assignee of the patentee, in asserting the right to sell the Aurora oil in any part of the United States, claims that no State could, consistently with the Federal Constitution and the laws of Congress, prevent or obstruct the exer-

the internal commerce of that State, the only remaining question is, whether, under the operation of the

police regulations of the state.

was an Act passed February 11, 1824, consisting of several sections. The first section, the only one passed upon by the court, required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other State of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States into the port of New York, or into any of the United States, and of all persons landed from the ship, or put on board, or suffered to go on board, any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age, and occupation should be falsely reported.

"The other sections required him to give bond, on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger, deemed liable to become a charge, to his last place of settlement; and required each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and name of the commander of the vessel. We gather from the report of the case that the defendant, Miln, was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the Circuit Court on the question, whether the Act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void.

"This court, expressly limiting its decision to the first section of the Act, held that it fell within the police powers of the States, and was not in conflict with the Federal Constitution.

"From this decision Mr. Justice Story dissented, and in his opinion stated that Chief Justice Marshall, who had died between the first and the second argument of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the States.

"In the *Passenger Cases*, reported in 7 How. 283, the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital on Staten Island. It authorized the health commissioner to demand, and, if not paid, to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port, one dollar and fifty cents for each cabin passenger, and one dollar for each steerage passenger, mate, sailor, or mariner, and from the master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the hospital.

"The defendant, Smith, who was sued for the sum of \$295 for re-
landed, for the purpose of maintaining a marine hospital
was held 'valid by the state courts but declared void, as
being unconstitutional, by the U. S. Sup. Ct.

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fusing to pay for 295 steerage passengers on board the British ship 'Henry Bliss,' of which he was master, demurred to the declaration on the ground that the Act was contrary to the Constitution of the United States, and void. From a judgment against him, affirmed in the Court of Errors of the State of New York, he sued out a writ of error, on which the question was brought to this court.

"It was here held, at the January Term, 1849, that the statute was 'repugnant to the Constitution and laws of the United States, and therefore void.' 7 How. 572.

"Immediately after this decision, the State of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection; and amendments and alterations have continued to be made up to the present time.

"As the law now stands, the master or owner of every vessel landing passengers from a foreign port is bound to make a report similar to the one recited in the statute held to be valid in the case of *New York v. Miln*; and on this report the mayor is to indorse a demand upon the master or owner that he give a bond for every passenger landed in the city, in the penal sum of \$300, conditioned to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief or support of the person named in the bond for four years thereafter; but the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of \$500 for each pauper is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the Commissioner of Emigration.

"Conceding the authority of the *Passenger Cases*, which will be more fully considered hereafter, it is argued that the change in the statute now relied upon requiring primarily a bond for each passenger landed, as an indemnity against his becoming a future charge to the State or county, leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger, takes it out of the principle of the case of *Smith v. Turner*, — the *Passenger Case* from New York. It is said that the statute in that case was a direct tax on the passenger, since the Act authorized the shipmaster to collect it of him, and that on that ground alone was it held void; while in the present case the requirement of the bond is but a suitable regulation under the power of the State to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of

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a tax on the owner of the vessel for the privilege of landing in N.Y. passengers transported from foreign countries.

New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*.

“To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum. To suppose that a vessel, which once a month lands from three hundred to one thousand passengers, or from three thousand to twelve thousand per annum, will give that many bonds of \$300 with good sureties, with a covenant for four years, against accident, disease, or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of one dollar and fifty cents collected of the passenger before he embarks on the vessel.

“Such bonds would amount in many instances, for every voyage, to more than the value of the vessel. The liability on the bond would be, through a long lapse of time, contingent on circumstances which the bondsman could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries.

“It is said that the purpose of the Act is to protect the State against the consequences of the flood of pauperism immigrating from Europe, and first landing in that city.

“But it is a strange mode of doing this to tax every passenger alike who comes from abroad.

“The man who brings with him important additions to the wealth of the country, and the man who is perfectly free from disease, and brings to aid the industry of the country a stout heart and a strong arm, are as much the subject of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel.

“No just rule can make the citizen of France landing from an English vessel on our shore liable for the support of an English or Irish pauper who lands at the same time from the same vessel. . . .

“The accuracy of these definitions is scarcely denied by the advocates of the State statutes. But assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the States, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the States.

The power to regulate commerce belongs exclusively to Congress. Any state statute is void, no matter under what class of it may fall, or by what name it may be known. It was this an exercise of the power of a state? Yes. But no exercise of that power the states are subject to the power of Congress.

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

"Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

"But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States."¹

¹ Compare *Chy Lung v. Freeman et al.*, 92 U. S. 275.

The vague and ill-considered notions that are widely entertained as to what is meant by the "police power," may be observed in certain misleading observations that have a considerable currency; *e.g.*, (that the Federal government has no police power in the States; that the Fourteenth Amendment has no relation to the police power of the States; that the States have never parted with the police power.) But in truth, the partition of the total powers of government which took place when our Federal Constitution was adopted, did not, either in name or in fact, proceed upon such lines as are here indicated. How thoroughly the powers of the Federal government are interlaced with those of the States as regards matters of local police, may be seen, for example, in the discussions relating to the regulation of foreign and interstate commerce, and commerce with the Indian tribes. As regards the Fourteenth Amendment, it had for its main purpose that of cutting down the local legislative power of the States, their "police power," and conferring on the general government the right to restrain them in exercising it. Under this amendment, indeed, its action is but negative. As regards the affirmative power of the general government, when it is remembered that certain entire topics are committed to it, for example, those of foreign relations, the taxing of imports, the post-office, the currency, bankruptcy, the regulation of external and interstate commerce, it is easy to see that much of what is understood by the "police power," is wrapped up in these things; in determining, for example, on the admission or exclusion of foreigners, in settling what may pass through the mails, or what goods shall come in free and what shall pay duty. — Ed.

MUNN v. ILLINOIS.

SUPREME COURT OF THE UNITED STATES. 1876.

[94 U. S. 113.]

ERROR to the Supreme Court of the State of Illinois. . . . [The Constitution of Illinois of 1870, art. xiii. s. 1, declared all elevators, where grain or other property is stored for a compensation, to be public warehouses; s. 2, required in places of not less than one hundred thousand inhabitants, the making under oath and public posting and filing of certain statements as to the amount and kind of grain or other property stored, and warehouse receipts issued and outstanding, and the daily noting of changes in the quantity and grade of grain; and forbade the mixing of different grades without the owners' consent; s. 3, secured the owner of stored property liberty to examine it, and the warehouse books and records relating to it; s. 4, bound common carriers to weigh or measure grain where shipped, and to receipt for it; and made them responsible for delivering it all; s. 5, required railroad companies to deliver grain directly to the consignee, if he could be reached by any track which they could use, and required them to allow connections with their tracks, for such purposes; ss. 6 and 7 made it the duty of the legislature to pass all necessary laws to prevent the issue of fraudulent warehouse receipts, and to give effect to this article of the Constitution, and for the inspection of grain and the protection of the producers, shippers, and receivers of grain and produce. A statute of Illinois, approved April 25, 1871, divided warehouses into classes A, B, and C; and required the keepers of warehouses of class A, to qualify by taking out a license, which should be revocable by the court granting it upon a summary proceeding, on complaint and satisfactory proof. The licensee was required to file a bond for the performance of his duty, with a surety in the sum of \$10,000. A penalty of \$100 a day was imposed for carrying on the business without a license. Warehousemen of class A were required yearly, during the first week in January, to publish the rates for the storage of grain for the coming year, and these were not to be increased during the year, — with certain exceptions. A maximum charge was fixed for storing and handling grain of 2 cents a bushel, for the first thirty days; and for each fifteen days or less afterwards, one half of one per cent a bushel; with certain variations.]

On the twenty-ninth day of June, 1872, an information was filed in the Criminal Court of Cook County, Ill., against Munn & Scott, alleging that they were, on the twenty-eighth day of June, 1872, in the city of Chicago, in said county, the managers and lessees of a public warehouse, known as the "North-western Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together

The Constitution of Ills. declared all grain elevators to be public warehouses, requiring certain things to be done, and giving power to the legislature to further regulate the business. Under the authority of the legislature made an enactment requiring licenses, the publishing of rates, and the fixing of maximum charges. An information was filed against M. & S., lessees and managers of a public warehouse

for not having taken out a license, and for charging rates greater than those fixed by statute. Judgment of conviction was affirmed by the State Supreme Ct. An error to the U. S. S. Ct. held the law was constitutional.

process of law, nor deny the equal protection of the law. The warehouses stood in the gateway of

commerce. It was a business in which

MUNN v. ILLINOIS.

[CHAP. V.]

in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen, as aforesaid, without procuring a license from the Circuit Court of said county, permitting them to transact business as public warehousemen, under the laws of the State.

To this information a plea of not guilty was interposed. From an agreed statement of facts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the ground occupied by the "North-western Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The North-western Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit Court of Cook County, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as required by sects. 3 and 4 of the Act of April 25, 1871. The city of Chicago, then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said Act, except in two particulars: first, they had not taken out a license, nor given a bond, as required by sects. 3 and 4; and, second, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by sect. 15.

The defendants were found guilty, and fined \$100.

The judgment of the Criminal Court of Cook County having been affirmed by the Supreme Court of the State, Munn & Scott sued out this writ, and assign for error:—

1. Sects. 3, 4, 5, and 15 of the statute are unconstitutional and void.

2. Said sections are repugnant to the third clause of sect. 8 of art. 1, and the sixth clause of sect. 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.

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one holds contra to this opinion. He gave a dissenting opinion in
the N. Y. case where the majority decided in accordance with
Munn & Scott. What is the distinction bet. an elevator

and then consider whether this case comes within the principle. The occupation of a bread maker is one in which the public are interested. Could the legislature regulate it?
CHAP. V.] MUNN v. ILLINOIS. 745

Mr. W. C. Goudy, with whom was Mr. John N. Jewett, for the plaintiffs in error.

Mr. James K. Edsall, Attorney-General of Illinois, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States ;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another ;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guarantee against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as

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they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe v. R. & V. Railroad Co.*, 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *Sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen,

for an elevator no compensation being given. Had, it was taking property for private use and had under the process of law.

and drymen, and the rates of commission of auctioneers," 9 Id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. . . . [Here follow passages from Sir Matthew Hale's writings, as to ferries and wharves.]

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt v. Stennett*, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In *Aldnut v. Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing Act, to receive wines from importers before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. . . . [Here follow long quotations from the opinions in this case, in which it is held that the charges must be reasonable.]

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court

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said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turn-pike roads, and other kindred subjects." *Mobile v. Yuille*, 3 Ala. n. s. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: —

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the

citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, *viz.*, that he . . . take but reasonable

toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the General Assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not

have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. (So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable.' The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

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But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, *viz.*, that no State shall "deny to any person within its

jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

[FIELD, J., gave a dissenting opinion, in which STRONG, J., concurred.]

RAILROAD COMPANY v. HUSEN.

SUPREME COURT OF THE UNITED STATES. 1877.

[95 U. S. 465.] ¹

ERROR to the Supreme Court of the State of Missouri. *Mr. James Carr*, for the plaintiff in error. *Mr. M. A. Low*, *contra*.

MR. JUSTICE STRONG delivered the opinion of the court.

Five assignments of error appear in this record; but they raise only a single question. It is, whether the statute of Missouri, upon which the action in the State court was founded, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The statute, approved Jan. 23, 1872, by its first section, enacted as follows: "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever." A later section is in these words: "If any person or persons shall bring into this State any Texas, Mexican, or Indian cattle, in violation of the first section of this Act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." Other sections make such bringing of cattle into the State a criminal offence, and provide penalties for it. It was, however, upon the provisions we have quoted that this action was brought against the railroad company that had conveyed the cattle into the county. It is noticeable that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that "when such cattle shall come across the line of the State, loaded upon a railroad car or steamboat, and shall pass through the State without being unloaded, such shall not be construed as prohibited by the Act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such route shall be *prima facie* evidence that such disease has been communicated by such transportation." This proviso imposes burdens and liabilities for transportation through the State, though the cattle be not unloaded, while the body of the section absolutely prohibits the introduction of any such cattle into the State, with the single exception mentioned.

It seems hardly necessary to argue at length, that, unless the statute

¹ The statement of facts is omitted. — Ed.

can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power, — that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the State is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State legislature. And if, as we have held, State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers, is prohibited by the Constitution because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. *Case of the State Freight Tax*, 15 Wall. 232; *Ward v. Maryland*, 12 Id. 418; *Wilton v. The State of Missouri*, 91 U. S. 275; *Henderson et al. v. Mayor of the City of New York et al.*, 92 Id. 259; *Chy Lung v. Freeman et al.*, Id. 275. The two latter of these cases refer to obstructions against the admission of persons into a State, but the principles asserted are equally applicable to all subjects of commerce.

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in *Thorpe v. The Rutland & Burlington Railroad Co.*, 27 Vt. 149, "it extends to the protection of the lives, limbs,

Regulation of commerce is for Congress and not for the states. Point of decision is whether the statute is

health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." . . . It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in the *Passenger Cases*, 7 How. 283, by Mr. Justice Greer, in the sacred law of self-defence. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. It was said in *Henderson et al. v. Mayor of the City of New York et al.*, *supra*, to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States." Substantially the same thing was said by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule of conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under cover of exert-

and not for the court, to interfere.

Doctrine of case is that it was not absolutely necessary for this legislation.

inconsistent with the exclusi
power of Congress to regulate commerce of a state, on the ground of self defence has the power to keep out yellow fever or disease cattle.

Relative honor of states and Congress. If these matters Congress is the judge.

Doctrine right to that in such a case as the Insular case it for Congre

ing its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S. to which we have referred are very instructive. In *Henderson v. The Mayor, &c.*, the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. So in the case of *Chy Lung v. Freeman*, where the pretence was the exclusion of lewd women; but as the statute was more far-reaching, and affected other immigrants, not of any class which the State could lawfully exclude, we held it unconstitutional. Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government.

Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, "You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, we do not doubt, it is beyond the power of the State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure.

In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeasel v. Alexander*, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they

into *Thayer* would say.

have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise ; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.

*Judgment reversed, and the record remanded with instructions to reverse the judgment of the Circuit Court of Grundy County, and to direct that court to award a new trial.*¹

IN *Beer Co. v. Mass.*, 97 U. S. 25, 32 (1878), on error to the Superior Court of Massachusetts, the plaintiff in error, having been incorporated in that State, in 1828, for the purpose of manufacturing malt liquors, denied the validity of a prohibitory liquor law of 1869, on the ground that it impaired the obligation of the contract of their charter. The Supreme Court of the United States (BRADLEY, J.), after holding that the Legislature of Massachusetts had reserved to itself power "to pass any law it saw fit," continued: "But there is another question in the case, which, as it seems to us, is equally decisive.

"The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all their varieties,' it is true ; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor ; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any

¹ In *Kimmish v. Ball*, 129 U. S. 217, 222 (1889), the court (FIELD, J.) said: "The case is, therefore, reduced to this, whether the State may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby ; and upon that we do not entertain the slightest doubt. Our answer, therefore, to the first question upon which the judge below differed is in the negative, that the section in question is not unconstitutional by reason of any conflict with the commercial clause of the Constitution.

"As to the second question, our answer is also in the negative. There is no denial of any rights and privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby ; and the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States does not give non-resident citizens of Iowa any greater privileges and immunities in that State than her own citizens there enjoy. So far as liability is concerned for the act mentioned, citizens of other States and citizens of Iowa stand upon the same footing. *Paul v. Virginia*, 8 Wall. 168." Compare *Harrigan v. Conn. River Lumber Co.*, 129 Mass. 580. — Ed.

The power ~~not~~ the discretion of the legislature to pass laws to protect the health & morals of the community could not be bargained away.

that the legislature may regulate such matters.
Police power referred to here is not limited to health and
morals. 758 HEAD MONEY CASES. [CHAP. V.

manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

"We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa*, 18 Wall. 129, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645.

"Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts." . . .
Judgment affirmed.

an Act of Congress imposing duty of 50 cents on each passenger not a citizen of the U. S. who shall come from a foreign port to any port within the U. S. is valid as being an incident of the regulation of commerce.

In the *Head Money Cases*, 112 U. S. 580, 590 (1884), in sustaining an Act of Congress of 1882, imposing "a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States," MILLER, J., for the court, said: "This Act of Congress is similar in its essential features to many statutes enacted by States of the Union for the protection of their own citizens, and for the good of the immigrants who land at seaports within their borders.

"That the purpose of these statutes is humane, is highly beneficial

in the exercise of a police power. If you define police power as being restricted to the government of

to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steamships, is beyond dispute. That the power to pass such laws should exist in some legislative body in this country is equally clear. This court has decided distinctly and frequently, and always after a full hearing from able counsel, that it does not belong to the States. That decision did not rest in any case on the ground that the State and its people were not deeply interested in the existence and enforcement of such laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the States and the general government, has conferred this power on the latter to the exclusion of the former. We are now asked to decide that it does not exist in Congress, which is to hold that it does not exist at all — that the framers of the Constitution have so worded that remarkable instrument, that the ships of all nations, including our own, can, without restraint or regulation, deposit here, if they find it to their interest to do so, the entire European population of criminals, paupers, and diseased persons, without making any provision to preserve them from starvation, and its concomitant sufferings, even for the first few days after they have left the vessel.

“This court is not only asked to decide this, but it is asked to overrule its decision, several times made with unanimity, that the power does reside in Congress, is conferred upon that body by the express language of the Constitution, and the attention of Congress directed to the duty which arises from that language to pass the very law which is here in question.

“That these statutes are regulations of commerce — of commerce with foreign nations — is conceded in the argument in this case; and that they constitute a regulation of that class which belongs exclusively to Congress is held in all the cases in this court. It is upon these propositions that the court has decided in all these cases that the State laws are void. . . . [Here the court considers an objection to the imposition in question as being not uniform and not levied to “provide for the common defence and general welfare of the United States.”]

“If it were necessary to prove that the imposition of this contribution on owners of ships is made for the general welfare of the United States, it would not be difficult to show that it is so, and particularly that it is among the means which Congress may deem necessary and proper for that purpose; and beyond this we are not permitted to inquire.

“But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce — of that branch of foreign commerce which is involved in immigration.”

then it would be proper to call this power of Congress something else than police power. Here is police power that is Congress. After Mr. Sumner said that Congress has no police power we see that it is not a police power. It is a police power incident to police power.

HEAD v. AMOSKEAG MANUFACTURING COMPANY.

SUPREME COURT OF THE UNITED STATES, 1885.

[113 U. S. 9.]

THIS was a writ of error to reverse a judgment of the Supreme Court of the State of New Hampshire against the plaintiff in error, upon a petition filed by the defendant in error (a corporation established by the laws of New Hampshire for the manufacture of cotton, woollen, iron and other materials) for the assessment of damages for the flowing of his land by its mill-dam at Amoskeag Falls on the Merrimack River, under the general mill Act of that State of 1868, ch. 20, which is copied in the margin. [It is omitted here; the substance of it sufficiently appears in what follows.]

In the petition filed in the State court, the Amoskeag Manufacturing Company alleged that it had been authorized by its charter to purchase and hold real estate, and to erect thereon such dams, canals, mills, buildings, machines and works as it might deem necessary or useful in carrying on its manufactures and business; that it had purchased the land on both sides of the Merrimack River at Amoskeag Falls, including the river and falls, and had there built mills, dug canals, and established works, at the cost of several millions of dollars, and, for the purpose of making the whole power of the river at the falls available for the use of those mills, had constructed a dam across the river; that the construction of the mills and dam, to raise the water for working the mills, for creating a reservoir of water, and for equalizing its flow, was of public use and benefit to the people of the State, and necessary for the use of the mills for which it was designed; and that Head, the owner of a tract of land, described in the petition, and bounded by the river, claimed damages for the overflowing thereof by the dam, which the corporation had been unable satisfactorily to adjust; and prayed that it might be determined whether the construction of the mills and dam, and the flowing, if any, of Head's land to the depth and extent that it might or could be flowed thereby, were or might be of public use or benefit to the people of the State, and whether they were necessary for the mills, and that damages, past or future, to the land by the construction of the dam might be assessed according to the statute.

At successive stages of the proceedings, by demurrer, by request to the court after the introduction of the evidence upon a trial by jury, and by motion in arrest of judgment, Head objected that the statute was unconstitutional, and that the petition could not be maintained, because they contemplated the taking of his property for private use, in violation of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall deprive any per-

son of his property without just compensation. Head petitioned to have an assessment of damages to the land ab. p. by the overflowing of the back-water. P. contended that the statute permitting the erection of dams

son of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; as well as in violation of the Constitution of the State, the Bill of Rights of which declares that all men have certain natural, essential and inherent rights, among which are the acquiring, possessing and protecting property, and that every member of the community has a right to be protected in the enjoyment of his property.

His objections were overruled by the highest court of New Hampshire, and final judgment was entered, adjudging that the facts alleged in the petition were true, and that, upon payment or tender of the damages assessed by the verdict, with interest, and fifty per cent added, making in all the sum of \$572.43, the company have the right to erect and maintain the dam, and to flow his land forever to the depth and extent to which it might or could be flowed or injured thereby. 56 N. H. 386; 59 N. H. 332, 563.

Mr. C. R. Morrison, for plaintiff in error.

Mr. George F. Hoar and *Mr. B. Wadleigh*, for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court. He recited the facts as above stated, and continued:

The position that the plaintiff in error has been denied the equal protection of the laws was not insisted upon at the argument. The single question presented for decision is whether he has been deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. It is only as bearing upon that question, that this court, upon a writ of error to a State court, has jurisdiction to consider whether the statute conforms to the Constitution of the State.

The charter of the Amoskeag Manufacturing Company, which authorized it to erect and maintain its mills and dam, gave it no right to flow the lands of others. *Eastman v. Amoskeag Manufacturing Co.*, 44 N. H. 143. The proceedings in the State court were had under the general mill Act of New Hampshire, which enacts that any person, or any corporation authorized by its charter so to do, may erect or maintain on his or its own land a water mill and mill-dam upon any stream not navigable, paying to the owners of lands flowed the damages which, upon a petition filed in court by either party, may be assessed, by a committee or by a jury, for the flowing of the lands to the depth and extent to which they may or can be flowed by the dam. N. H. Stat. 1868, ch. 20.

The plaintiff in error contends that his property has been taken by the State of New Hampshire for private use, and that any taking of private property for private use is without due process of law.

The defendant in error contends that the raising of a water power upon a running stream for manufacturing purposes is a public use; that the statute is a constitutional regulation of the rights of riparian owners; and that the remedy given by the statute is due process of law.

A mill corp under statute may be authorized to improve the river and permanently overflow the lands of others, giving compensation. This is not an exercise of the power of eminent domain.

that question aside.

Prop. was not taken here by the right of domain.

The statute regulated the use of the river.

The use of the river by the enjoyment of property.

An exercise of the power of the State.

like property.

Act provided.

ably can be defended.

on grounds of eminent domain.

also.

An exercise of the power of the State.

here where it is now.

in the decision.

referred as the property.

That is good.

General mill Acts exist in a great majority of the States of the Union. Such Acts, authorizing lands to be taken or flowed *in invitum*, for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware and North Carolina, as well as in Massachusetts, New Hampshire and Rhode Island, before the Declaration of Independence; and exist at this day in each of these States, except Maryland, where they were repealed in 1832. One passed in North Carolina in 1777 has remained upon the statute-book of Tennessee. They were enacted in Maine, Kentucky, Missouri and Arkansas, soon after their admission into the Union. They were passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama and Florida, while they were yet Territories, and re-enacted after they became States. They were also enacted in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia and Georgia, but were afterwards repealed in Georgia. The principal statutes of the several States are collected in the margin. [The note refers to the statutes of twenty-nine States. It is omitted here.]

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In most of those States, their validity has been assumed, without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in three States only, and for incompatibility with their respective constitutions. *Loughbridge v. Harris* (1871), 42 Georgia, 500; *Tyler v. Beacher* (1871), 44 Vermont, 648; *Ryerson v. Brown* (1877), 35 Michigan, 333. The earlier cases in Tennessee, Alabama and New York, containing dicta to the same effect, were decided upon other grounds. *Harding v. Goodlett*, 3 Yerger, 40; *Memphis Railroad v. Memphis*, 4 Coldwell, 406; *Moore v. Wright*, 34 Alabama, 311, 333; *Bottoms v. Brewer*, 54 Alabama, 288; *Hay v. Cohoes Co.*, 3 Barb. 42, 47, and 2 N. Y. 159.

The principal objects, no doubt, of the earlier Acts were grist mills; and it has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist mill which grinds for all comers, at tolls fixed by law, is for a public use. See also *Blair v. Cuming County*, 111 U. S. 363.

But the statutes of many States are not so limited, either in terms, or in the usage under them. In Massachusetts, for more than half a century, the mill Acts have been extended to mills for any manufacturing purpose. Mass. Stat. 1824, ch. 153; *Wolcott Woollen Manufacturing Co. v. Upham*, 5 Pick. 292; *Palmer Co. v. Ferrill*, 17 Pick. 58, 65. And throughout New England, as well as in Pennsylvania, Virginia, North Carolina, Kentucky, and many of the Western States, the statutes are equally comprehensive.

It has been held in many cases of high authority, that special Acts of incorporation, granted by the legislature for the establishment of dams to increase and improve the water power of rivers and navigable waters, for mechanical and manufacturing purposes, are for a public use. *Scudder v. Trenton Delaware Falls Co.*, Saxton, 694, 728, 729; *Boston & Roxbury Mill Corporation v. Newman*, 12 Pick. 467;

Hazen v. Essex Co., 12 Cush. 475; *Commonwealth v. Essex Co.*, 13 Gray, 239, 251, 252; *Hankins v. Lawrence*, 8 Blackford, 266; *Great Falls Manufacturing Co. v. Fernald*, 47 N. H. 444.

In some of those cases, the authority conferred by general mill Acts upon any owner of land upon a stream to erect and maintain a mill on his own land and to flow the land of others, for manufacturing purposes, has been considered as resting on the right of eminent domain, by reason of the advantages inuring to the public from the improvement of water power and the promotion of manufactures. See also *Holyoke Co. v. Lyman*, 15 Wall. 500, 506, 507; *Beekman v. Saratoga & Schenectady Railroad*, 3 Paige, 45, 73; *Talbot v. Hudson*, 16 Gray, 417, 426. And the validity of general mill Acts, when directly controverted, has often been upheld upon that ground, confirmed by long usage or prior decisions. *Jordan v. Woodward*, 40 Maine, 317; *Olmstead v. Camp*, 33 Conn. 532; *Todd v. Austin*, 34 Conn. 78; *Venard v. Cross*, 8 Kansas, 248; *Harding v. Funk*, 8 Kansas, 315; *Miller v. Troost*, 14 Minnesota, 282; *Newcomb v. Smith*, 1 Chandler, 71; *Fisher v. Horicon Co.*, 10 Wisconsin, 351; *Babb v. Mackey*, 10 Wisconsin, 314; *Burnham v. Thompson*, 35 Iowa, 421.

In New Hampshire, from which the present case comes, the legislature of the Province in 1718 passed an Act (for the most part copied from the Massachusetts Act of 1714), authorizing the owners of mills to flow lands of others, paying damages assessed by a jury. The Act of 1718 continued in force until the adoption of the first Constitution of the State in 1784, and afterwards until June 20, 1792, and was then repealed, upon a general revision of the statutes, shortly before the State Constitution of 1792 took effect. The provisions of the Bill of Rights, on which the plaintiff in error relied in the court below, were exactly alike in the two constitutions. Special Acts authorizing the flowing of lands upon the payment of damages were passed afterwards from time to time; among others, the statute of July 8, 1862, authorizing the Great Falls Manufacturing Company to erect a dam upon Salmon Falls River, which was adjudged by the Supreme Judicial Court of New Hampshire in 1867, in an opinion delivered by Chief Justice Perley, to be consistent with the Constitution of that State, because the taking authorized was for a public use. *Great Falls Manufacturing Co. v. Fernald*, 47 N. H. 444. The statute now in question, the first general mill Act passed by the legislature of the State, was passed and took effect on July 3, 1868; was held in *Ash v. Cummings*, 50 N. H. 591, after elaborate argument against it, to be constitutional, upon the ground of the decision in *Great Falls Manufacturing Co. v. Fernald*; and was enforced without question in *Portland v. Morse*, 51 N. H. 188, and in *Town v. Faulkner*, 56 N. H. 255. In the case at bar, and in another case since, the State court held its constitutionality to be settled by the former decisions. *Amoskeag Manufacturing Co. v. Head*, 56 N. H. 386, and 59 N. H. 332, 563; *Same v. Worcester*, 60 N. H. 522.

The question whether the erection and maintenance of mills for

manufacturing purposes under a general mill Act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.

When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.

In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided, will order owelty to be paid, or in many States, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold. *King v. Reed*, 11 Gray, 490; *Bentley v. Long Dock Co.*, 1 McCarter, 480; s. c. on appeal, nom. *Manners v. Bentley*, 2 McCarter, 501; *Mead v. Mitchell*, 17 N. Y. 210; *Richardson v. Monson*, 23 Conn. 94. Water rights held in common, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds. *Smith v. Smith*, 10 Paige, 470; *De Witt v. Harvey*, 4 Gray, 486; *McGillivray v. Evans*, 27 California, 92.

At the common law, as Lord Coke tells us, "If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione facienda*; and the writ saith, *ad reparationem et sustentationem ejusdem domus teneantur*; whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." Co. Lit. 200 b; 4 Kent Com. 370. In the same spirit, the statutes of Massachusetts, for a hundred and seventy-five years, have provided that any tenant in common of a mill in need of repair may notify a general meeting of all the owners for consultation, and that, if any one refuses to attend, or to agree with the majority, or to pay his share, the majority may cause the repairs to be made, and recover his share of the expenses out of the mill or its profits or earnings. Mass. Prov. Stat. 1709, ch.

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3, 1 Prov. Laws (State ed.) 641, and Anc. Chart. 388; Stat. 1795, ch. 74, §§ 5-7; Rev. Stat. 1836, ch. 116, §§ 44-58; Gen. Stat. 1860, ch. 149, §§ 53-64; Pub. Stat. 1882, ch. 190, §§ 59-70. And the statutes of New Hampshire, for more than eighty years, have made provision for compelling the repair of mills in such cases. *Roberts v. Peavey*, 7 Foster, 477, 493.

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The statutes which have long existed in many States authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Coomes v. Burt*, 22 Pick. 422; *Wright v. Boston*, 9 Cush. 233, 241; *Sherman v. Tobey*, 3 Allen, 7; *Lowell v. Boston*, 111 Mass. 454, 469; *French v. Kirkland*, 1 Paige, 117; *People v. Brooklyn*, 4 N. Y. 419, 438; *Coster v. Tide Water Co.*, 3 C. E. Green, 54, 68, 518, 531; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Indiana, 169.

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By the maritime law, based, as Lord Tenterden observed, on the consideration that the actual employment of ships is "a matter, not merely of private advantage to the owners, but of public benefit to the State," and recognized in the decisions and the rules of this court, courts of admiralty, when the part-owners of a ship cannot agree upon her employment, authorize the majority to send her to sea, on giving security to the dissenting minority, to bring back and restore the ship, or, if she be lost, to pay them the value of their shares; and in such case the minority can neither recover part of the profits of the voyage nor compensation for the use of the ship. Abbott on Shipping, pt. 1, ch. 3, §§ 2, 3; *The Steamboat Orleans*, 11 Pet. 175, 183; Rule 20 in Admiralty, 3 How. vii.; *The Marengo*, 1 Lowell, 52. If the part-owners are equally divided in opinion upon the manner of employing the ship, then, according to the general maritime law, recognized and applied by Mr. Justice Washington, the ship may be ordered to be sold and the proceeds distributed among them. *The Seneca*, 18 Am. Jur. 485; s. c. 3 Wall. Jr. 395. See also Story on Partnership, § 439; *The Nelly Schneider*, 3 P. D. 152.

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But none of the cases, thus put by way of illustration, so strongly call for the interposition of the law as the case before us.

The right to the use of running water is *publici juris*, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back. If the water thus

dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the mill Acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.

This view of the principle upon which general mill Acts rest has been fully and clearly expounded in the judgments delivered by Chief Justice Shaw in the Supreme Judicial Court of Massachusetts.

In delivering the opinion of the court in a case decided in 1832, he said: "The statute of 1796 is but a revision of a former law, and the origin of these regulations is to be found in the provincial statute of 1714. They are somewhat at variance with that absolute right of dominion and enjoyment which every proprietor is supposed by law to have in his own soil; and in ascertaining their extent it will be useful to inquire into the principle upon which they are founded. We think they will be found to rest for their justification, partly upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property, which is often so situated that it could not be beneficially used without the aid of this power. A stream of water often runs through the lands of several proprietors. One may have a sufficient mill-site on his own land, with ample space on his own land for a mill-pond or reservoir, but yet, from the operation of the well-known physical law that fluids will seek and find a level, he cannot use his own property without flowing the water back more or less on the lands of some other proprietor. We think the power given by statute was intended to apply to such cases, and that the legislature meant to provide that, as the public interest in such case coincides with that of the mill-owner, and as the mill-owner and the owner of lands to be flowed cannot both enjoy their full rights, without some interference, the latter shall yield to the former, so far that the former may keep up his mill and head of water, notwithstanding the damage done to the latter, upon payment of an equitable compensation for the real damage sustained, to be ascertained in the mode provided by the statute." "From this view of the object and purpose of the statute, we think it quite manifest that it was designed to provide for the most useful and beneficial occupation and enjoyment of natural streams and watercourses, where the absolute right of each proprietor to use his own land and water privileges, at his own pleasure, cannot be fully enjoyed, and one must of necessity, in some degree, yield to the other." *Fiske v. Framingham Manufacturing Co.*, 12 Pick. 68, 70-72.

In another case, decided almost twenty years later, he said: "The relative rights of land-owners and mill-owners are founded on the established rule of the common law, that every proprietor, through whose territory a current of water flows, in its course towards the sea, has an equal right to the use of it, for all reasonable and beneficial purposes, including the power of such stream for driving mills, subject to a like reasonable and beneficial use, by the proprietors above him and below him, on the same stream. Consequently no one can deprive another of his equal right and beneficial use, by corrupting the stream, by wholly diverting it, or stopping it from the proprietor below him, or raise it artificially, so as to cause it to flow back on the land of the proprietor above. This rule, in this Commonwealth, is slightly modified by the mill Acts, by the well-known provision, that when a proprietor erects a dam on his own land, and the effect is, by the necessary operation of natural laws, that the water sets back upon some land of the proprietor above, a consequence which he may not propose as a distinct purpose, but cannot prevent, he shall not thereby be regarded as committing a tort, and obliged to prostrate his dam, but may keep up his dam, paying annual or gross damages, the equitable assessment of which is provided for by the Acts. It is not a right to take and use the land of the proprietor above, against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community. It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 552, 553.

Other opinions of Chief Justice Shaw illustrate the same view. *Williams v. Nelson*, 23 Pick. 141, 143; *French v. Braintree Manufacturing Co.*, 23 Pick. 216, 218-221; *Cury v. Daniels*, 8 Met. 466, 476, 477; *Murdock v. Stickney*, 8 Cush. 113, 116; *Gould v. Boston Duck Co.*, 13 Gray, 442, 450. It finds more or less distinct expression in other authorities. *Lowell v. Boston*, 111 Mass. 464-466; *United States v. Ames*, 1 Woodb. & Min. 76, 88; *Waddy v. Johnson*, 5 Iredell, 333, 339; *Jones v. Skinner*, 61 Maine, 25, 28; *Omstead v. Camp*, 33 Conn. 547, 550; Chief Justice Redfield, in 12 Am. Law Reg. (n. s.) 498-500. And no case has been cited in which it has been considered and rejected.

Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other States, maintaining the validity of general mill Acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without

some such regulation could not be beneficially used. The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. *Walker v. Sauvinet*, 92 U. S. 90; *Davidson v. New Orleans*, 96 U. S. 97; *Hurtado v. California*, 110 U. S. 516; *Hagar v. Reclamation District*, 111 U. S. 701. Judgment affirmed.¹

MR. JUSTICE BLATCHFORD did not sit in this case, or take any part in its decision.

WURTS v. HOAGLAND ET AL.

SUPREME COURT OF THE UNITED STATES. 1885.

[114 U. S. 606.]

THIS was a writ of error by the devisees of Mary V. Wurts to reverse a judgment confirming an assessment of commissioners for the drainage of lands under the statute of New Jersey of March 8, 1871, the material provisions of which are as follows. [These will be found in a note.²]

¹ Compare *Lowell v. Boston*, 111 Mass. 454, 464-471 (1873), *Turner v. Nye*, 154 Mass. 579 (1891), *infra*, 893. — Ed.

² By § 1, "the Board of Managers of the Geological Survey, on the application of at least five owners of separate lots of land included in any tract of land in this State which is subject to overflow from freshets, or which is usually in a low, marshy, boggy or wet condition," are authorized to examine the tract, and, if they deem it for the interest of the public and of the land owners to be affected thereby, then to make surveys, and decide upon and adopt a system of drainage, and report it to the Supreme Court of the State; and thereupon the court, upon reasonable notice published in a newspaper circulating in the county where the tract is, shall appoint three commissioners to superintend and carry out the system of drainage so adopted and reported; "provided, that if, at the time fixed for such appointment of commissioners, it shall appear to the court by the written remonstrance of the owners of a majority of the said low and wet lands duly authenticated by affidavit, that they are opposed to the drainage thereof at the common expense, then the said court shall not appoint such commissioners."

By § 2, the commissioners shall cause the tract to be drained in accordance with the general plan of the board of managers, and, after the completion of the work, report to the Supreme Court the expense thereof, together with a general description of the lands which, in their judgment, ought to contribute to the expense; notice of the report shall be published for four weeks, in order that any persons interested may examine the report, and file objections to it; if any such objections are filed within the four weeks, the Supreme Court shall determine upon the same in a summary manner,

and included in the tract and not objected to by the owners of the tract or of the tract and for the assessment by commissioners of the notice and bearing of the expenses upon all the owners does not def

of the 14th amendment. It was legislation looking to
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By proceedings had in accordance with this statute, the Board of Managers of the Geological Survey, upon the application of more than five owners of separate lots of land situated in the tract of land known as the Great Meadows on the Pequest River, examined and surveyed the entire tract, and reported a plan for draining it to the Supreme Court, and on November 15, 1872, three commissioners were appointed to carry the plan into execution.

Pending the proceedings, on March 19, 1874, a supplemental statute was passed, by § 2 of which, "if the said commissioners, after having commenced the drainage of such tract, and proceeded therewith, shall, before the drainage of the same shall be completed, be compelled to suspend the completion thereof, from any inability at that time to raise the money required therefor, they shall proceed to ascertain the tracts of land benefited or intended to be benefited by said drainage, and the relative proportions in which the said respective tracts have been or will be benefited thereby, and also the expenses already incurred in said drainage, and as near as may be the additional expenses required for the completion thereof," and make and report to the court an assessment of such expenses.

In accordance with that provision of the statute of 1874, the commissioners, before completing the work, made and reported to the court an assessment based upon an estimate of contemplated benefits, which

and, without further notice, make an order directing the commissioners "to distribute and assess the amount of said expense and interest, upon the lands contained within the territory reported by them originally, or as corrected by the Supreme Court, in proportion, as near as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed;" the assessment, when completed, shall be deposited in some convenient place for inspection by the parties interested, and notice of the completion of the assessment, and of the place where it is deposited, published for six weeks, designating a time and place when and where the commissioners will meet to hear objections to the assessment; and the commissioners, having heard and decided upon such objections as shall be made to them, shall proceed to complete their assessment and file it in the clerk's office of the Supreme Court, and notice of the filing shall be published for four weeks, after which, if no objections have been made to the assessment, it shall be confirmed by the court; any objections filed within the four weeks the Supreme Court shall hear and determine in a summary manner, but "shall not reverse said assessment or any part thereof, except for some error in law, or in the principles of assessment, made or committed by said commissioners;" if for any such cause the assessment or any part thereof shall be reversed, it shall be referred to the commissioners to be corrected accordingly, and, when it shall have been corrected and filed, like proceedings shall be had, until the court shall finally confirm the assessment; and thereupon the commissioners shall publish notice for four weeks, requiring the several owners or other parties interested in the lands assessed to pay their assessments.

By § 3, further provisions are made for collecting the assessment by demand on the owner of the lands assessed, and if he cannot be found, or neglects or refuses to pay, then by sale of his land for the least number of years that any person will take the same.

By § 5, the commissioners may from time to time borrow the necessary moneys to carry on the work of draining the lands, and give their bonds as such commissioners therefor, and pledge for the repayment thereof the assessment to be made as aforesaid.

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was, for that reason, upon objections filed by Mrs. Wurts, set aside by an order of the Supreme Court, affirmed by the Court of Errors. 10 Vroom, 433; 12 Vroom, 175.

On May 17, 1879, after the completion of the work, the commissioners made a report to the court, pursuant to the statute of 1871, showing the expense to have been \$107,916.07. No objections to that report having been filed after four weeks' notice, the court on June 23, ordered the commissioners to distribute that sum "upon the land mentioned in their said report, in proportion, as nearly as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed." The commissioners made an assessment accordingly, the proportion of which on the lands of Mrs. Wurts was \$13,347.84, and, after notice to and hearing of all parties who desired to object to the assessment, reported it to the Supreme Court, which directed it to be modified as to certain lands of other parties lying outside the original survey, and in other respects confirmed the assessment, notwithstanding objections made to it by the devisees of Mrs. Wurts; and its judgment was affirmed in the Court of Errors. 13 Vroom, 553; 14 Vroom, 456. The judgment of the Court of Errors was the final judgment in the case, and this writ of error was addressed to the Supreme Court because at the time of suing out the writ of error the record had been transmitted to that court and was in its possession. 105 U. S. 701.

The error assigned was that "the Act of March 8, 1871, upon which the said judgment and proceedings are founded, violates the Constitution of the United States in this, that it deprives the plaintiffs in error of their property without due process of law, and denies to them the equal protection of the laws, and violates the first section of the Fourteenth Amendment to the Constitution of the United States."

Mr. Samuel Dickson and Mr. J. G. Shipman, for plaintiffs in error.

Mr. Theodore Little, for defendants in error.

MR. JUSTICE GRAY, after making the foregoing statement of facts, delivered the opinion of the court.

General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long existed in the State of New Jersey, and have been sustained and acted on by her courts, under the Constitution of 1776, as well as under that of 1844. Stats. December 23, 1783, Wilson's Laws, 382; November 29, 1788, and November 24, 1792, Paterson's Laws, 84, 119; *Jones v. Lore*, Pennington, 1048; *Doremus v. Smith*, 1 Southard, 142; *Westcott v. Garrison*, 1 Halsted, 132; *State v. Frank & Guisbert Creek Co.*, 2 J. S. Green, 301; *State v. Newark*, 3 Dutcher, 185, 194; *Berdan v. Riser Drainage Co.*, cited 3 C. E. Green, 69; *Coster v.*

Tide Water Co., 3 C. E. Green, 54, 68, 518, 531; *State v. Blake*, 6 Vroom, 208, and 7 Vroom, 442; *Hoagland v. Wurts*, 12 Vroom, 175, 179.

In *State v. Newark*, 3 Dutcher, 185, 194, the Supreme Court said: "Laws for the drainage or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police power of the government."

In *Coster v. Tide Water Co.*, 3 C. E. Green, 54, 518, the same view was strongly asserted in the Court of Chancery and in the Court of Errors. The point there decided was that a statute providing for the drainage of a large tract of land overflowed by tide-water, by a corporation chartered for the purpose, none of the members of which owned any lands within the tract, if it could be maintained as an exercise of the right of eminent domain for a public use, yet could not authorize an assessment on the owners of such lands for anything beyond the benefits conferred upon them. But the case was clearly and sharply distinguished from the case of the drainage of lands for the exclusive benefit of the owners upon proceedings instituted by some of them.

Chancellor Zabriskie said: "But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the draining of uplands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated of by all juriconsults and writers upon law through the civilized world; a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present Constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the Constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well understood part of that legislative power." "The principle of them all is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the Acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land

remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of legislative power, and may well be considered as included in the grant of legislative power in the Constitution." 3 C. E. Green, 68-71.

Chief Justice Beasley, in delivering the judgment of the Court of Errors, enforced the same distinction, saying: "This case, with regard to the grounds on which it rests, is to be distinguished from that class of proceedings by which meadows and other lands are drained on the application of the land owners themselves. In the present instance, the State is the sole actor, and public necessity or convenience is the only justification of her intervention. But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party walls and partition fences. To these cases, therefore, the principle upon which the decision of the present case rests is not to be extended." 3 C. E. Green, 531.

These full and explicit statements have been since treated by the courts of New Jersey as finally establishing the constitutionality of such statutes.

In *State v. Blake*, 6 Vroom, 208, and 7 Vroom, 442, a statute authorizing a tract of swamps and marsh lands to be drained by commissioners elected by the owners of the lands, and the entire expense assessed upon all the owners, was held to be constitutional, although no appeal was given from the assessment. In the Supreme Court it was said: "This branch of legislative power which regulates the construction of ditches and secures the drainage of meadows and marshy lands has been exercised so long, and is so fully recognized, that it is now too late to call it in question. It is clearly affirmed in *The Tide Water Co. v. Coster*, and cannot be opened to discussion." 6 Vroom, 211. And the Court of Errors, in a unanimous judgment, approved this statement of the Supreme Court, as well as that of Chief Justice Beasley, in *Coster v. Tide Water Co.*, above quoted, 7 Vroom, 447, 448.

The constitutionality of the statute of 1871, under which the proceedings in the case at bar were had, was upheld by the Supreme Court and the Court of Errors upon the ground of the previous decisions. *In re Lower Chatham Drainage*, 6 Vroom, 497, 501; *In re Pequest River Drainage*, 10 Vroom, 433, 434; 12 Vroom, 175, 179; 13 Vroom, 553, 554, and 14 Vroom, 456. The farther suggestion made by the Supreme Court in 6 Vroom, 501, 506, and 10 Vroom, 434, that this statute could be maintained as a taking of private property for a public use, was disapproved by the Court of Errors in 12 Vroom, 178.

In *Kean v. Driggs Drainage Co.*, 16 Vroom, 91, cited for the plaintiffs in error, the statute that was held unconstitutional created a private corporation with power to drain lands without the consent or application

of any of the owners; and the Supreme Court observed that in the opinions of the Court of Errors in the present case and in *Coster v. Tide Water Co.*, the distinction was clearly drawn between meadow drainage for the exclusive benefit of the owners, to be done at their sole expense, and drainage undertaken by the public primarily as a matter of public concern, in which case the assessment upon land owners must be limited to benefits imparted. 16 Vroom, 94.

This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. (The case comes within the principle upon which this court upheld the validity of general mill Acts in *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9.)

It is also well settled by the decisions of the courts of New Jersey that such proceedings are not within the provision of the Constitution of that State securing the right of trial by jury. New Jersey Constitution of 1776, art. 22; Constitution of 1844, art. 1, sec. 7; *Scudder v. Trenton Delaware Falls Co.*, Saxton, 694, 721-725; *In re Lower Chatham Drainage*, 7 Vroom, 442; *Howe v. Plainfield*, 8 Vroom, 145.

The statute of 1871 is applicable to any tract of land within the State which is subject to overflow from freshets, or which is usually in low, marshy, boggy or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract, that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error in law or in the principles of assessment, before the court, upon the amount of the assessment.

As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither

been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. *Barbier v. Connolly*, 113 U. S. 27, 31; *Walker v. Sauvinet*, 92 U. S. 90; *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation District*, 111 U. S. 701. *Judgment affirmed.*

YICK WO v. HOPKINS. WO LEE v. HOPKINS.

SUPREME COURT OF THE UNITED STATES. 1886.

[118 U. S. 356.]

THESE two cases were argued as one and depended upon precisely the same state of facts; the first coming here upon a writ of error to the Supreme Court of the State of California, the second on appeal from the Circuit Court of the United States for that district.

The plaintiff in error, Yick Wo, on August 24, 1885, petitioned the Supreme Court of California for a writ of habeas corpus, alleging that he was illegally deprived of his personal liberty by the defendant as sheriff of the city and county of San Francisco.

The sheriff made return to the writ that he held the petitioner in custody by virtue of a sentence of the Police Judges Court, No. 2, of the city and county of San Francisco, whereby he was found guilty of a violation of certain ordinances of the board of supervisors of that county, and adjudged to pay a fine of \$10, and, in default of payment, be imprisoned in the county jail at the rate of one day for each dollar of fine until said fine should be satisfied, and a commitment in consequence of non-payment of said fine.

The ordinances for the violation of which he had been found guilty were set out as follows:—

Order No. 1569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be located.

"The people of the city and county of San Francisco do ordain as follows:

"SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

"SEC. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit

and who had certificates from the fire wardens and the health officer. After the passage of this ordinance he applied to the supervisors for a license to carry on his business but they refused.

for continuing business and a petition for habeas corpus was refused by the state Supreme Ct. (An error to U. S. Sup. Ct.)

shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

"SEC. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment."

Order No. 1587, passed July 28, 1880, the following section:

"SEC. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

The following facts were also admitted on the record: That petitioner is a native of China and came to California in 1861, and is still a subject of the Emperor of China; that he has been engaged in the laundry business in the same premises and building for twenty-two years last past; that he had a license from the board of fire wardens, dated March 3, 1884, from which it appeared "that the above described premises have been inspected by the board of fire wardens, and upon such inspection said board found all proper arrangements for carrying on the business; that the stoves, washing and drying apparatus, and the appliances for heating smoothing irons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1617, defining 'the fire limits of the city and county of San Francisco and making regulations concerning the erection and use of buildings in said city and county,' and of order No. 1670, 'prohibiting the kindling, maintenance, and use of open fires in houses;' that he had a certificate from the health officer that the same premises had been inspected by him, and that he found that they were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry, without injury to the sanitary condition of the neighborhood, had been complied with; that the city license of the petitioner was in force and expired October 1st, 1885; and that the petitioner applied to the board of supervisors, June 1st, 1885, for consent of said board to maintain and carry on his laundry, but that said board, on July 1st, 1885, refused said consent." It is also admitted to be true, as alleged in the petition, that, on February 24, 1880, "there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China. and of the whole number, viz., 320, about 310 were constructed of wood, the same material that constitutes nine-tenths of the houses in the city of San Francisco. The capital thus invested by the subjects of China was not less than two hundred thousand dollars, and they paid annually for rent,

say it is then is the ordinance unconstitutional. The state put a construction on the statute which made it constitutional. This Sup Ct. refuses to follow the construction of the state court.

bet. a statute and an ordinance. It is difficult to find not exactly what the court does decide.

license, taxes, gas, and water about one hundred and eighty thousand dollars."

It was alleged in the petition, that "your petitioner and more than one hundred and fifty of his countrymen have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioner, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined by this system of oppression to one kind of men and favoritism to all others."

The statement therein contained as to the arrest, &c., was admitted to be true, with the qualification only, that the eighty odd laundries referred to are in wooden buildings without scaffolds on the roofs.

It was also admitted "that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted."

By section 2 of article XI. of the Constitution of California it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

By section 74 of the Act of April 19, 1856, usually known as the Consolidation Act, the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; . . . to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; . . . to regulate the sale, storage, and use of gunpowder or other explosive or combustible materials and substances, and make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

The Supreme Court of California, in the opinion pronouncing the judgment in this case, said: . . . "The order No. 1569 and section 68 of order No. 1587 are not in contravention of common right or unjust, unequal, partial, or oppressive, in such sense as authorizes us in this proceeding to pronounce them invalid."

After answering the position taken in behalf of the petitioner, that the ordinances in question had been repealed, the court added: "We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the Constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by

But just what the judges do mean is very doubtful

that discretion may be properly exercised. Upper court says that discretionary exercise of power is unconstitutional.

the cases of *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703." The writ was accordingly discharged and the prisoner remanded.

In the other case the appellant, Wo Lee, petitioned for his discharge from an alleged illegal imprisonment, upon a state of facts shown upon the record, precisely similar to that in the case of Yick Wo. In disposing of the application, the learned Circuit Judge, Sawyer, in his opinion, 26 Fed. Rep. 471, after quoting the ordinance in question, proceeded at length as follows: . . . [Here follows a strong statement of the judge's personal opinion that this ordinance violates the Constitution and treaties of the United States.]

But, in deference to the decision of the Supreme Court of California in the case of Yick Wo, and contrary to his own opinion as thus expressed, the circuit judge discharged the writ and remanded the prisoner.

Mr. Hall McAllister, Mr. L. H. Van Schaick, and Mr. D. L. Smoot, for plaintiffs in error.

Mr. Alfred Clarke and Mr. H. G. Sieberst, for defendant in error.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State, is not open to us. And although that question might have been considered in the Circuit Court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the State court upon the points involved in that inquiry.

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exer-

[Where a state constitution makes operation of the state arbitrary the U. S. Sup. Ct. will accept the construction - turn as part of the state and will go ahead to consider the constitutionality of the law. Where the State Ct. says the operation of the state is valid the U. S. Sup. Ct. will as

sume jurisdiction but will proceed to consider whether the construction was right {Yick Wo v Hop.} and whether the operation of the act is constitutional

the court is. It is not unconstitutional; but the upper court may say so not unconstitutional; but the upper court may say this is a cont. and therefore the law is unconstitutional.

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cised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703. . . .

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this Government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise

measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." . . . [For the passage here omitted see *ante*, p. 532.]

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.

In reference to that right, it was declared by the Supreme Judicial Court of Massachusetts, in *Capen v. Foster*, 12 Pick. 485, 489, in

the words of Chief Justice Shaw, "that in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly, and convenient manner;" nevertheless, "such a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself." It has accordingly been held generally in the States, that, whether the particular provisions of an Act of legislation, establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question. See *Daggett v. Hudson*, 1 Western Reporter, 789, decided by the Supreme Court of Ohio, where many of the cases are collected; *Monroe v. Collins*, 17 Ohio St. 665.

The same principle has been more freely extended to the quasi-legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it was the doctrine, that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of Parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. Dillon on Municipal Corporations, 3d ed., § 319, and cases cited in notes. Accordingly, in the case of *The State of Ohio ex rel. &c. v. The Cincinnati Gas-Light and Coke Company*, 18 Ohio St. 262, 300, an ordinance of the city council purporting to fix the price to be charged for gas, under an authority of law giving discretionary power to do so, was held to be bad, if passed in bad faith, fixing an unreasonable price, for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of their works. And a similar question, very pertinent to the one in the present cases, was decided by the Court of Appeals of Maryland, in the case of the *City of Baltimore v. Radecke*, 49 Maryland, 217. . . . [Here follows a statement of this case. The case itself is found *infra*, p. 864.]

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclu-

sively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370; and *Soon Hing v. Crowley*, 113 U. S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

*The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.*¹

¹ See *Ho Ah Kow v. Numan*, 5 Sawyer U. S. C. C. 552 (1879); *Parrott's Case*, 6 Ib. 349 (1880); *In re Ah Chong*, 6 Ib. 451; *Ex parte Sing Lee*, 96 Cal. 354 (1892). — Ed.

very singular opinion.

The public administration of the law is a denial of equal protection of the laws.

MUGLER v. KANSAS.

SUPREME COURT OF THE UNITED STATES, 1887.

[123 U. S. 623.]

[Two cases, entitled as above, on error to the Supreme Court of Kansas, and another case, *Kansas v. Ziebold*, on appeal from the Circuit Court of the United States for the District of Kansas, are here grouped together.]

The Constitution of the State of Kansas contains the following article, being art. 15 of § 10, which was adopted by the people November 2, 1880:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes."

The Legislature of Kansas enacted a statute to carry this into effect, the provisions of which are set forth by the court in its opinion in this case, to which reference is made. This statute [approved Feb. 19, 1881] took effect on the 1st of May, 1881.

The plaintiff in error, Mugler, the proprietor of a brewery in Saline County, Kansas, was indicted in the District Court in that county in November, 1881, for offences against this statute.

The first indictment against him contained five counts charging that he, on five different specified days in November, 1881, in the county of Saline, "unlawfully did sell, barter, and give away spirituous, malt, vinous, fermented, and other intoxicating liquors," he "not having a permit to sell intoxicating liquors, as provided by law, contrary to the statutes," &c.; and a sixth count charging that in Saline County, at a time named in that month, he "did unlawfully keep and maintain a certain common nuisance, to wit: "his brewery, then and there "kept and used for the illegal selling, bartering, and giving away, and illegal keeping for sale, barter, and use of intoxicating liquors, in violation of the provisions of an Act," &c.

The parties made an agreed statement of facts, which was all the evidence introduced in the case, and which was as follows:

"It is hereby stipulated and agreed that the facts in the above-entitled case are, and that the evidence would prove them to be, as follows:

"That the defendant, Peter Mugler, has been a resident of the State of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time intending to become such citizen, he did, in the month of June, 1881, by the judgment of the District Court of Wyandotte County, Kansas, become a full citizen of the United States, and since that time has been a citizen of the United States and of the State of Kansas.

public nuisances liable to be abated as such.

Mugler was found guilty and sentenced to pay a fine. This judgment was affirmed by the State Sup. Ct. the case came up on error to

was whether these statutes abridged the privileges or immunities of citizens of the U. S. or deprived persons of

"That in the year 1877 said defendant erected and furnished a brewery on lots Nos. 152 and 154 on Third Street, in the city of Salina, Saline County, Kansas, for use in the manufacture of a malt liquor commonly known as beer; that such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the purposes for which it was designed and intended after its completion in 1877 and up to May 1, 1881.

"That of the beer so manufactured and on hand prior to February 19, 1881, said defendant made one sale since May 1, 1881, which is the sale charged in the first count of the indictment, said sale being made on the above-described premises; that the beer so sold was in the original packages in which it was placed after its manufacture, and was not sold for use nor used on said premises; and that at the time of such sale said defendant had no permit to sell intoxicating liquors, as provided by chapter 128 of Laws of 1881."

Mugler was adjudged to be guilty, and was sentenced to pay a fine of one hundred dollars and costs, and motions for a new trial and in arrest of judgment were overruled. This judgment being affirmed by the Supreme Court of the State on appeal, the cause was brought here by writ of error on his motion.

The indictment in the second case charged that, on the first day of November, 1881, in Saline County he "did unlawfully manufacture, and aid, assist, and abet in the manufacture of vinous, spirituous, malt, fermented, and other intoxicating liquors, in violation of the provisions of an Act," &c., he then and there "not having taken out and not having a permit to manufacture intoxicating liquors as provided by law, contrary to the statutes," &c.

The parties made the following agreed statement of facts which was all the evidence introduced in the case.

"It is hereby stipulated and agreed that the facts in the above-entitled case are, and that the evidence would prove them to be, as follows:

"That the defendant, Peter Mugler, had been a resident of the State of Kansas continually since the year 1872; that, being foreign born, he in that year declared his intention to become a citizen of the United States, and always since that time intending to become such citizen, he did, in the month of June, 1881, by the judgment of the District Court of Wyandotte County, Kansas, become a full citizen of the United States and of the State of Kansas.

"That in the year 1877 said defendant erected and furnished a brewery on lots Nos. 152 and 154 on Third Street, in the city of Salina, Saline County, Kansas, for use in the manufacture of an intoxicating malt liquor commonly known as beer.

"That such building was specially constructed and adapted for the manufacture of such malt liquor, at an actual cost and expense to said defendant of ten thousand dollars, and was used by him for the pur-

community secured by the Const. The prohibition on the sale of liquors may be enforced against anyone who at the time happens to own property whose chief value consists in its fitness

life, liberty or property no due process law.

It was agreed that

among the rights guaranteed by

compact between the state and its citizens

is the right of the latter to manufacture for their own use

either food or drink so far as the

did not affect the rights of others.

well, such prohibitory legislation does not infringe any right or privilege

of any citizen.

well, such prohibitory legislation does not infringe any right or privilege

of any citizen.

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poses for which it was designed and intended after its completion in 1877 and up to May 1st, 1881. That said brewery was at all times after its completion and on May 1, 1881, worth the sum of ten thousand dollars for use in the manufacture of said beer, and is not worth to exceed the sum of twenty-five hundred dollars for any other purpose. That said defendant, since October 1, 1881, has used said brewery in the manner and for the purpose for which it was constructed and adapted by the manufacturing therein of such intoxicating malt liquors, and at the time of such manufacture of said malt liquors said defendant had no permit to manufacture the same for medical, scientific, or mechanical purposes, as provided by chapter 128 of Laws of 1881."

The defendant was adjudged to be guilty, and was fined one hundred dollars and costs, and, as in the other case, motions for a new trial and in arrest of judgment were overruled, and the judgment being affirmed by the Supreme Court of the State of Kansas on appeal, the defendant sued out a writ of error to review it. . . . [The assignment of errors is here set forth. It sufficiently appears in the opinion.]

Mr. George G. Vest, for plaintiff in error.

Mr. B. S. Bradford, Attorney-General of the State of Kansas, Mr. George R. Peck, Mr. J. B. Johnson and Mr. George J. Barker, for defendant in error, submitted on their brief.

On the 7th March, 1885, the Legislature of Kansas passed an Act "amendatory of and supplemental to" the Act of 1881. Among other changes made, § 13 was amended so as to read as shown in the footnote.¹

¹ For convenience this section is reprinted here, although it will be found, *infra*, in the opinion of the court.

"Sec. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this Act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this Act are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such a place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The attorney-general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding, shall be punished as for contempt, by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, in the discretion of the court."

see what an immense vista of power is conferred on the legislature. The legislature could pass a law

of power of regulating their own affairs. But it was intended to cut down their power very materially.

On the 13th August, 1886, there was filed in the office of the District Court for the County of Atchison, Kansas, an information against Ziebold and his partner, who were proprietors of a brewery there. The information prayed that the brewery might be adjudged to be a common nuisance; that it be ordered to be shut up and abated; that the defendants be enjoined from using or permitting to be used the premises as a place where intoxicating liquors were sold, bartered, or given away, or were kept for barter, sale, or gift, otherwise than by authority of law; and that the defendants might be enjoined from keeping the brewery open, and from selling, bartering, or giving away, or keeping for sale, barter, gift, or use in or about the premises, or manufacturing for barter, sale, or gift in the State of Kansas, any malt, vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, &c., or kept for sale, &c., or manufactured for sale, &c. in the State of Kansas. On the defendants' motion this case was removed to the Circuit Court of the United States, where an amended bill in equity was filed, praying for the relief asked for in the State court. After joinder of issue and hearing the Circuit Court dismissed the bill, from which decree the State appealed.

Mr. S. B. Bradford, Attorney-General of the State of Kansas, *Mr. Edwin A. Austin*, Assistant Attorney-General of that State, and *Mr. J. F. Tufts*, Assistant Attorney General for Atchison County, Kansas, for appellant submitted on their brief. October 25, 1887, *Mr. Bradford* moved the court to reopen the cause and reassign it for argument. October 26, 1887, the court denied the motion.

Mr. Joseph H. Choate, for appellee, *Mr. Robert M. Eaton* and *Mr. John C. Tomlinson* were with him on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court: —

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors. . . .

By a statute of Kansas, approved March 3, 1868, it was made a misdemeanor, punishable by fine and imprisonment, for any one, directly or indirectly, to sell spirituous, vinous, fermented, or other intoxicating liquors, without having a dram-shop, tavern, or grocery license. It was also enacted, among other things, that every place where intoxicating liquors were sold in violation of the statute should be taken, held, and deemed to be a common nuisance; and it was required that all rooms, taverns, eating-houses, bazaars, restaurants, groceries, coffee-houses, cellars, or other places of public resort where intoxicating liquors were sold, in violation of law, should be abated as public nuisances. Gen. Stat. Kansas, 1868, c. 35, § 6.

But, in 1880, the people of Kansas adopted a more stringent policy. On the 2d of November of that year, they ratified an amendment to the State Constitution, which declared that the manufacture and sale of intoxicating liquors should be forever prohibited in that State, except for medical, scientific, and mechanical purposes.

in value from \$1,000 to 2500. Perfectly proper result however. Like abating a nuisance.

certain food in- gives the user no Can the legislative prohibit everyone from using that food. Probably so.

It is no- ticeable in this case that public safety is added to health and mor- in the enumera- tion of the purposes of police power.

Here the burden was re- duced

In order to give effect to that amendment, the legislature repealed the Act of 1868, and passed an Act, approved February 19, 1881, to take effect May 1, 1881, entitled "An Act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes." Its first section provides "that any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor: *Provided, however*, That such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this Act." The second section makes it unlawful for any person to sell or barter for either of such excepted purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without having procured a druggist's permit therefor, and prescribes the conditions upon which such permit may be granted. The third section relates to the giving by physicians of prescriptions for intoxicating liquors to be used by their patients, and the fourth, to the sale of such liquors by druggists. The fifth section forbids any person from manufacturing or assisting in the manufacture of intoxicating liquors in the State, except for medical, scientific, and mechanical purposes, and makes provision for the granting of licenses to engage in the business of manufacturing liquors for such excepted purposes. The seventh section declares it to be a misdemeanor for any person, not having the required permit, to sell or barter, directly or indirectly, spirituous, malt, vinous, fermented, or other intoxicating liquors; the punishment prescribed being, for the first offence, a fine not less than one hundred nor more than five hundred dollars, or imprisonment in the county jail not less than twenty nor more than ninety days; for the second offence, a fine of not less than two hundred nor more than five hundred dollars, or imprisonment in the county jail not less than sixty days nor more than six months; and for every subsequent offence, a fine not less than five hundred nor more than one thousand dollars, or imprisonment in the county jail not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court. The eighth section provides for similar fines and punishments against persons who manufacture, or aid, assist, or abet the manufacture of any intoxicating liquors without having the required permit. The thirteenth section declares, among other things, all places where intoxicating liquors are manufactured, sold, bartered, or given away, or are kept for sale, barter, or use, in violation of the Act, to be common nuisances; and provides that upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall be directed to shut up and abate the same.

Under that statute, the prosecutions against Mugler were instituted. It contains other sections in addition to those above referred to; but as they embody merely the details of the general scheme adopted by the

State for the prohibition of the manufacture and sale of intoxicating liquors, except for the purposes specified, it is unnecessary to set them out.

On the 7th of March, 1885, the legislature passed an Act amendatory and supplementary to that of 1881. The thirteenth section of the former Act, being the one upon which the suit against Ziebold & Hagelin is founded, will be given in full in a subsequent part of this opinion. . . .

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer. . . . [Here follows a statement of *The License Cases*, 5 How. 504, and quotations from *Bartmeyer v. Iowa*, 18 Wall. 129, and *Beer Co. v. Mass.*, 97 U. S. 25.]

Finally, in *Foster v. Kansas*, 112 U. S. 201, 206, the court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in *Gibbons v. Ogden*, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government.

It is, however, contended, that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that

of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn v. Illinois*, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . .

The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that

the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in

Barbier v. Connolly, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. . . .

. . . It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. \ In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments. \

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile State legislation, this court in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 751, said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone v. Mississippi*, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants." . . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." Again, in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672: "The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adop-

tion of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Beer Co. v. Massachusetts*, 97 U. S. 25, 32; *Commonwealth v. Alger*, 7 Cush. 53. An illustration of this doctrine is afforded by *Patterson v. Kentucky*, 97 U. S. 501. . . . [Here follows a statement of this case.]

See also *United States v. Dewitt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462; *Pervear v. Commonwealth*, 5 Wall. 475.

Another decision, very much in point upon this branch of the case, is *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667, also decided after the adoption of the Fourteenth Amendment. The court there sustained the validity of an ordinance of the village of Hyde Park, in Cook County, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive or unwholesome matter, or from maintaining or carrying on an offensive or unwholesome business or establishment within its limits. The Fertilizing Company had, at large expense, and under authority expressly conferred by its charter, located its works at a particular point in the county. Besides, the charter of the village, at that time, provided that it should not interfere with parties engaged in transporting animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It said: "We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions."

It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelly v. Green Bay Co.*, 13 Wall. 166. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defence was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a

navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the Constitution of Wisconsin, providing that "the property of no person shall be taken for public use without just compensation therefor." This court said it would be a very curious and unsatisfactory result, were it held that, "if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." pp. 177, 178.

These principles have no application to the case under consideration. The question in *Pumpelly v. Green Bay Company* arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people. That case, as this court said in *Transportation Co. v. Chicago*, 99 U. S. 635, 642, was an extreme qualification of the doctrine, universally held, that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use," do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a "permanent flooding of private property," a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case,

unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, “continuing in its nature,” and “to be dealt with as the special exigencies of the moment may require;” and that, “for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.” So in *Beer Co. v. Massachusetts*, 97 U. S. 32: “If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.”

It now remains to consider certain questions relating particularly to the thirteenth section of the Act of 1885. That section — which takes the place of § 13 of the Act of 1881 — is as follows. . . . [This is given *ante*, p. 784, note.]

It is contended by counsel in the case of *Kansas v. Ziebold & Hagelein*, that the entire scheme of this section is an attempt to deprive persons who come within its provisions of their property and of their liberty without due process of law; especially, when taken in connection with that clause of § 14 (amendatory of § 21 of the Act of 1881) which provides that “in prosecutions under this Act, by indictment or otherwise, . . . it shall not be necessary in the first instance for the State to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes.”

We are unable to perceive anything in these regulations inconsistent with the constitutional guarantees of liberty and property. The State

having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

It is said that by the thirteenth section of the Act of 1885, the legislature, finding a brewery within the State in actual operation, without notice, trial, or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation, the court is not to determine whether it is a common nuisance, but, under the command of the statute, is to find it to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without inquiry—and, it may be, contrary to the fact and against his own judgment—the edict of the legislature, the court is commanded to take possession by its officers of the place and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offence, but merely because the legislature so commands; and it is done by a court of equity, without any previous conviction first had, or any trial known to the law.

This, certainly, is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, the court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen. But those statutes have no such scope and are attended with no such results as the defendants suppose. The court is not required to give effect to a legislative “decree” or “edict,” unless every enactment by the law-making power of a State is to be so characterized. It is not declared that every establishment is to be deemed a common nuisance because it may have been maintained prior to the passage of the statute as a place for manufacturing intoxicating liquors. The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the State to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used, as to make it a common nuisance.

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Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. "In regard to public nuisances," Mr. Justice Story says, "the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction." 2 Story's Eq. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. *District Attorney v. Lynn and Boston Railroad Co.*, 16 Gray, 242, 245; *Attorney-General v. New Jersey Railroad*, 2 Green, Ch. 139; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239, 244; *State v. Mayor*, 5 Porter (Ala.), 279, 294; *Hoole v. Attorney-General*, 22 Ala. 190, 194; *Attorney-General v. Hunter*, 1 Dev. Eq. 12; *Attorney-General v. Forbes*, 2 Myl. & Cr. 123, 129, 133; *Attorney-General v. Great Northern Railway Co.*, 1 Drew. & Sm. 154, 161; *Eden on Injunctions*, 259; *Kerr on Injunctions* (2d ed.), 168.

As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was, not whether a place, kept and maintained for purposes forbidden by the statute, was, *per se*, a nuisance — that fact being conclusively determined by the statute itself — but whether the place in question was so kept and maintained.

If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the

verdict of a jury in her favor. In this case, it cannot be denied that the defendants kept and maintained a place that is within the statutory definition of a common nuisance. Their petition for the removal of the cause from the State court, and their answer to the bill, admitted every fact necessary to maintain this suit, if the statute, under which it was brought, was constitutional.

Touching the provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the State has proven that the place described is kept and maintained for the manufacture or sale of intoxicating liquors — such manufacture or sale being unlawful except for specified purposes, and then only under a permit — the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the State.

A portion of the argument in behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other States, and, upon that ground, are repugnant to the clause of the Constitution of the United States, giving Congress power to regulate commerce with foreign nations and among the several States. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the State or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defence, we observe that it will be time enough to decide a case of that character when it shall come before us.¹

*For the reasons stated, we are of opinion that the judgments of the Supreme Court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by the Constitution of the United States, and its judgment, in each case, is, accordingly, affirmed. We are, also, of opinion that the Circuit Court of the United States erred in dismissing the bill of the State against Ziebold & Hagelin. The decree in that case is reversed, and the cause remanded, with directions to enter a decree granting to the State such relief as the Act of March 7, 1885, authorizes.*²

[FIELD, J., gave a dissenting opinion.]

¹ *Held*, that it would not, in *Kidd v. Pearson*, 128 U. S. 1 (1888). — ED.

² As to the relation between this extensive power of the States and the Constitution and laws of the United States, see *Bowman v. Chic. & N. W. Ry. Co.*, 125 U. S. 465 (1888); *Leisy v. Hardin*, 135 U. S. 100 (1890), and *In re Rahrer*, 140 U. S. 545 (1891). — ED.

IN *Smith v. Alabama*, 124 U. S. 465 (1888), on error to the Supreme Court of Alabama, the validity was in question of a statute of that State requiring all locomotive engineers to be examined and licensed by a State Court. In holding this valid, MATTHEWS, J., for the court, said: "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by State laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States. . . . But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the regulation between carriers of passengers and merchandise and the public who employ them, which are not misplaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States."¹

¹ A like result was reached in *Nashville, &c. Railway v. Ala.*, 128 U. S. 96 (1888), in considering another statute of the same State requiring, in the case of various classes of railroad employees, an examination and a certificate of fitness, as regards color-blindness and defective vision, from a State board of medical men. See *Jamieson v. Ind. Nat. Gas Co.*, 128 Ind. 555. — ED.

Where the power of Congress, as to regulate commerce, is exclusive and legislative of State may be interfere and bad. But a statute of Alabama requiring locomotive engineers to be examined and licensed is not a regulation of interstate commerce and is valid until displaced by an act of Congress. It governs the regulation between carriers of passengers and the public who employ them.

CROWLEY v. CHRISTENSEN.

SUPREME COURT OF THE UNITED STATES. 1890.

[137 U. S. 86.]

THIS was an appeal from an order of the Circuit Court of the United States for the Northern District of California discharging, on *habeas corpus*, the petitioner for the writ, the appellee here, from the custody of the chief of police of the city and county of San Francisco, by whom he was held under a warrant of arrest issued by the Police Court of that municipality, upon a charge of having engaged in and carried on in that city the business of selling spirituous, malt, and fermented liquors and wines in less quantities than one quart, without the license required by the ordinance of the city and county. The ordinance referred to provided that every person who sold such liquors or wines in quantities less than one quart should be designated as "a retail liquor-dealer" and as "a grocer and retail liquor-dealer," and that no license as such liquor-dealer, after January 1, 1886, "shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the Board of Police Commissioners of the city and county of San Francisco to carry on or conduct said business; but, in case of refusal of such consent, upon application, said Board of Police Commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor-dealer or grocery and retail liquor-dealer is to be carried on;" and that such license should be issued for a period of only three months. The ordinance further declared that any person violating this provision should be deemed guilty of a misdemeanor.

The Constitution of California provides, in the eleventh section of Article 11, that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The petitioner had, previously to June 10, 1889, carried on the business of retail liquor-dealer in San Francisco for some years, under licenses from the Board of Police Commissioners, but his last license was to expire on the 17th of that month. Previously to its expiration he was informed by the Police Commissioners that they had withdrawn their consent to the further issue of a license to him. He afterwards tendered to the collector of license fees, through which officer it was the practice of the Board to issue the licenses, the sum required for a new license, but the tender was not accepted, and his application for a new license was refused. He then applied to the Police Commissioners for a hearing before them on the question of revoking their consent to the issue of a further license to him. Such hearing was accorded to him, and the time fixed for it was the 24th of June. But, before any hearing

was had, he was arrested upon a warrant of the Police Court upon the charge of carrying on the business of a retail liquor-dealer without a license. He then obtained from the Supreme Court of the State a writ of *habeas corpus* to be discharged from the arrest, but that court, on the 2d of August, 1890, held the ordinance valid and remanded him to the custody of the chief of police. He then applied for the allowance of an appeal from this order to the Supreme Court of the United States, but it was refused by the Chief Justice of the State Court, and the Associate Justice of the Supreme Court of the United States assigned to the circuit, who could have allowed the appeal, was absent from the State. On the 7th of August following a new complaint was made against the petitioner, charging him with unlawfully engaging in and carrying on in San Francisco the business of a retail liquor-dealer without a license under the ordinance of the city and county. Upon this complaint a warrant was issued under which he was arrested. He thereupon applied to the Circuit Court of the United States for a writ of *habeas corpus*, which was issued.

In return to the writ, the chief of police, the appellant here, stated that he held the petitioner under the warrant mentioned by the petitioner and several other warrants issued by the Police Court of the city and county, upon different charges, made at different times, of his conducting and carrying on the business of a retail liquor-dealer in San Francisco without a license, as required by the ordinance of the city and county. He also stated, among other things, that a further license to the petitioner was refused by the Police Commissioners, because they had reason to believe that the business was carried on by him under his existing license in such a manner as to be offensive, and violative of the criminal laws of the State and of the rights of others. In support of this charge it was averred that in that business the petitioner was assisted by one whom he represented and claimed to be his wife, and that she had on one occasion stolen one hundred and sixty dollars from a person who visited his saloon, and been convicted of the offence in the Superior Court of the city and county, and sentenced to be imprisoned for one year, and on another occasion had stolen a watch and a scarf-pin from a person at the saloon, and was held to answer for the charge. It was also averred that there were more than sixteen citizens of San Francisco owning real estate in the block on which the petitioner carried on his business. It did not appear that on the hearing of the application any proof was offered of the facts alleged either in the petition or in the return. The case was heard upon exceptions or demurrer to the return. To that part respecting the alleged larceny by the wife and her conviction, the demurrer was on the ground that the return also showed that an appeal had been taken from the conviction, which was then pending, and that she might be acquitted of the offence charged.

Several objections were urged by the petitioner to the ordinance. Some of them were of a technical character, and could not be considered. Of the others only one was noticed, which was, that by it "the State of

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California, by its officers, denies to him the equal protection of the laws, and makes and enforces against him a law which abridges his privileges and immunities as a citizen of the United States," contrary to the Fourteenth Amendment to the Constitution of the United States.

The court held that the ordinance made the business of the petitioner depend upon the arbitrary will of others, and in that respect denied to him the equal protection of the laws, and accordingly ordered his discharge. 43 Fed. Rep. 243. From that order the case was brought to this court by appeal under §§ 763 and 764 of the Revised Statutes, this latter section as amended by the Act of March 3, 1885, c. 353, 23 Stat. 437.

Mr. Davis Louderback and *Mr. J. D. Page*, for appellant.

Mr. Alfred Clarke and *Mr. Joseph D. Redding*, for appellee.

MR. JUSTICE FIELD, after stating the case as above, delivered the opinion of the court.

It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in the Constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment, and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas* is a maxim of universal application.

For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured, or sold require, also, special qualifications in the parties permitted to use, manufacture, or sell them. All this is but common knowledge, and would hardly be mentioned were it not for the position often taken, and vehemently pressed, that there is something

wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States.

The Constitution of California vests in the municipality of the city and county of San Francisco the right to make "all such local, police,"

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sanitary, and other regulations as are not in conflict with general laws." The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation. The learned Circuit Judge¹ saw in the provisions of the ordinance empowering the police commissioners to grant or refuse their assent to the application of the petitioner for a license, or failing to obtain their assent upon application, requiring it to be given upon the recommendation of twelve citizens owning real estate in the block or square in which his business as a retail dealer in liquors was to be carried on, the delegation of arbitrary discretion to the police commissioners, and to real estate owners of the block, which might be and was exercised to deprive the petitioner of the equal protection of the laws. And he considers that his view in this respect is supported by the decision in *Yick Wo v. Hopkins*, 118 U. S. 356.

In that case it appeared that an ordinance of the city and county of San Francisco passed in July, 1880, declared that it should be unlawful after its passage "for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." The ordinance did not limit the power of the supervisors to grant such consent, where the business was carried on in wooden buildings. It left that matter to the arbitrary discretion of the board. Under the ordinance the consent of the supervisors was refused to the petitioner to carry on the laundry business in wooden buildings, where it had been conducted by him for over twenty years. He had, at the time, a certificate from the board of fire wardens that his premises had been inspected by them, and upon such inspection they had found all proper arrangements for carrying on the business, and that all proper precautions had been taken to comply with the provisions of the ordinance defining the fire limits of the city and county; and also a certificate from the health officer that the premises had been inspected by him and were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with. The limits of the city and county embraced a territory some ten miles wide by fifteen or more in length, much of it being occupied at the time, as stated by the Circuit Judge, as farming and pasture lands, and much of it being unoccupied sand banks, in many places without buildings within a quarter or half a mile of each other. It appeared also that, in the practical administration of the ordinance, consent was given by the board of supervisors to some parties to carry on the laun-

¹ For his opinion, see *In re Christensen*, 43 Fed. Rep. 243. — Ed.

dry business in buildings other than those of brick or stone, but that all applications coming from the Chinese, of whom the petitioner was one, to carry on the business in such buildings were refused. This court said of the ordinance: "It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and, on the other, those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.

It would seem that some stress is placed upon the allegation of the petitioner that there were not twelve persons owners of real property in the block where the business was to be carried on. This allegation is denied in the return, which alleges that there were more than sixteen such property holders. As the case was heard upon exceptions or demurrer to the return, its averments must be taken as true. At common law no evidence was necessary to support the return. It was deemed to import verity until impeached. *Hurd on Habeas Corpus*, book 2, c. 3, §§ 8, 9, and 10; *Church on Same*, § 122. And this rule is not changed by any statute of the United States. It must, therefore, be considered as a fact in the case that there were more than sixteen owners of real estate in the block. But if the fact were otherwise, and there was not the number stated in the petition, the result would not be affected. If there were no property holders in the block, the discretionary authority would be exercised finally by the police commissioners, and their refusal to grant the license is not a matter for review by this court, as it violates

no principle of Federal law. We however find in the return a statement which would fully justify the action of the commissioners. It is averred that in the conduct of the liquor business the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offence and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted, for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner.

The order discharging the petitioner must be

*Reversed, and the cause remanded with directions to take further proceedings in conformity with this opinion, and it is so ordered.*¹

Statute of N. Y.
established the
maximum charge

it could be made
- elevating,
- elevating and dis-
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and did not deprive the citizen of his property
without due process of law. The business of elevating grain

affected with a public interest and is of a quasi-public

BUDD v. NEW YORK.
NEW YORK EX REL. ANNAN v. WALSH.
NEW YORK EX REL. PINTO v. WALSH.
SUPREME COURT OF THE UNITED STATES. 1892.
[143 U. S. 517.]²

[ERROR to the Superior Court' of Buffalo, New York, and to the Supreme Court of New York.]

Mr. Benjamin F. Tracy and Mr. William N. Dykman, for Annan and Pinto, plaintiffs in error. Mr. Spencer Clinton, for Budd, plaintiff in error. Mr. J. A. Hyland, for the defendants in error in 644 and 645. Mr. George T. Quinby filed a brief for the defendants in error in 719 [Budd v. N. Y.].

MR. JUSTICE BLATCHFORD, after stating the case, delivered the opinion of the court.

The main question involved in these cases is whether this court will adhere to its decision in *Munn v. Illinois*, 94 U. S. 113.

The Court of Appeals of New York, in *People v. Budd*, 117 N. Y. 1, held that chapter 581 of the laws of 1888 did not violate the constitutional guarantee protecting private property, but was a legitimate exercise of the police power of the State over a business affected with a public interest. In regard to the indictment against Budd, it held

¹ See *Ex parte Sing Lee*, 96 Cal. 354 (1892). Compare *Chic. Ry. Co. v. Minn.*, ante, p. 660, and note, p. 673. In *Sharp v. Wakefield*, [1891] Appeal Cases, 173, 182, a case relating to licenses for selling intoxicating liquors, LORD BRAMWELL said: "Houses of public entertainment and for the sale of drink have been in this country, and in many others, the subject of regulation for police purposes; not for what one may call economic purposes, like the fixing of the price of bread or the wages of labor, but for the maintenance of order."—ED.

² The facts are sufficiently given in the opinion. — ED.

Munn v. Ills.
again

The statute
also limits
the charge of
handling

actual
cost

at an unreasonable rate. Will the court enquire into the reasonableness? This decision does not pass upon the question. But probably the fixing of this line
CHAP. V.] BUDD v. NEW YORK. 805

that the charge of exacting more than the statute rate for elevating was proved, and that as to the alleged overcharge for shovelling, it appeared that the carrier was compelled to pay \$4 for each 1000 bushels of grain, which was the charge of the shovellers' union, by which the work was performed, and that the union paid the elevator, for the use of the latter's steam shovel, \$1.75 for each 1000 bushels. The court held that there was no error in submitting to the jury the question as to the overcharge for shovelling; that the intention of the statute was to confine the charge to the "actual cost" of the outside labor required; and that a violation of the Act in that particular was proved; but that, as the verdict and sentence were justified by proof of the overcharge for elevating, even if the alleged overcharge for shovelling was not made out, the ruling of the Superior Court of Buffalo could not have prejudiced Budd. Of course, this court, in these cases, can consider only the Federal questions involved.

It is claimed, on behalf of Budd, that the statute of the State of New York is unconstitutional, because contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, in depriving the citizen of his property without due process of law; that it is unconstitutional in fixing the maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses at five-eighths of one cent a bushel and in forbidding the citizen to make any profit upon the use of his property or labor; and that the police power of the State extends only to property or business which is devoted by its owner to the public, by a grant to the public of the right to demand its use. It is claimed on behalf of Annan and Pinto that floating and stationary elevators in the port of New York are private property, not affected with any public interest, and not subject to the regulation of rates.

"Trimming" in the canal-boat, spoken of in the statute, is shovelling the grain from one place to another, and is done by longshoremen with scoops or shovels; and "trimming" the ship's cargo when loading is stowing it and securing it for the voyage. Floating elevators are primarily boats. Some are scows, and have to be towed from place to place by steam tugs; but the majority are propellers. When the floating elevator arrives at the ship and makes fast alongside of her, the canal-boat carrying the grain is made fast on the other side of the elevator. A long wooden tube, called "the leg of the elevator," and spoken of in the statute, is lowered from the tower of the elevator so that its lower end enters the hold of the canal-boat in the midst of the grain. The "spout" of the elevator is lowered into the ship's hold. The machinery of the elevator is then set in motion, the grain is elevated out of the canal-boat, received and weighed in the elevator, and discharged into the ship. The grain is lifted in "buckets" fastened to an endless belt which moves up and down in the leg of the elevator.

The lower end of the leg is buried in the grain so that the buckets are

low enough that the corp. can not possibly make any money
then the court will enquire into it. The court will ask
whether the legislature has passed beyond constitutional limits
if legislature can do anything not forbidden by the const.

submerged in it. As the belt moves, each bucket goes up full of grain, and at the upper end of the leg, in the elevator tower, empties its contents into the hopper which receives the grain. The operation would cease unless the grain was trimmed or shovelled to the leg as fast as it is carried up by the buckets. There is a gang of longshoremen who shovel the grain from all parts of the hold of the canal-boat to "the leg of the elevator," so that the buckets may be always covered with grain at the lower end of the leg. This "trimming or shovelling to the leg of the elevator," when the canal-boat is unloading, is that part of the work which the elevator owner is required to do at the "actual cost."

In the Budd and Pinto cases, the elevator was a stationary one on land; and in the Annan case, it was a floating elevator. In the Budd case, the Court of Appeals held that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator beyond the sum specified, for the use of its machinery in shovelling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner were permitted to separate the services, and charge for the use of the steam shovel any sum which might be agreed upon between him and the shovellers' union, and thereby, under color of charging for the use of his steam shovel, exact from the carrier a sum for elevating beyond the rate fixed therefor by the statute.

The Court of Appeals, in its opinion in the Budd case, considered fully the question as to whether the legislature had power, under the Constitution of the State of New York, to prescribe a maximum charge for elevating grain by stationary elevators, owned by individuals or corporations who had appropriated their property to that use and were engaged in that business; and it answered the inquiry in the affirmative. It also reviewed the case of *Munn v. Illinois*, 94 U. S. 113, and arrived at the conclusion that this court there held that the legislation in question in that case was a lawful exercise of legislative power, and did not infringe that clause of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall “deprive any person of life, liberty or property without due process of law;” and that the legislation in question in that case was similar to, and not distinguishable in principle from, the Act of the State of New York.

In regard to *Munn v. Illinois*, the Court of Appeals said that the question in that case was raised by an individual owning an elevator and warehouse in Chicago, erected for, and in connection with which he had carried on, the business of elevating and storing grain, many years prior to the passage of the Act in question, and prior also to the adoption of the amendment to the Constitution of Illinois in 1870, declaring all elevators and warehouses, where grain or other property

which the legislature may think is affected with a public interest is subject to the control of the legislature. Why then may not any acceptance be controlled by the legislature? The doctrine approaches the

is stored for a compensation, to be public warehouses. The Court of Appeals then cited the cases of *People ex rel. etc. v. B. & A. R. R. Co.*, 70 N. Y. 569; *Bertholf v. O'Reilly*, 74 N. Y. 509; *B. E. S. R. R. Co. v. B. S. R. R. Co.*, 111 N. Y. 132; and *People v. King*, 110 N. Y. 418, as cases in which *Munn v. Illinois* had been referred to by it, and said that it could not overrule and disregard *Munn v. Illinois* without subverting the principle of its own decision in *People v. King*, and certainly not without disregarding many of its deliberate expressions in approval of the principle of *Munn v. Illinois*.

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The Court of Appeals further examined the question whether the power of the legislature to regulate the charge for elevating grain, where the business was carried on by individuals upon their own premises, fell within the scope of the police power, and whether the statute in question was necessary for the public welfare. It affirmed that, while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services, or interfere with freedom of contract, and while the merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which, by the common law and the practice of free governments, justified legislative control and regulation in the particular case, so that the statute would be constitutional; that the control which, by common law and by statute, was exercised over common carriers, was conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the State and country, and the practical monopoly enjoyed by those engaged in it; that about 120,000,000 bushels of grain come annually to Buffalo from the West; that the business of elevating grain at Buffalo is connected mainly with lake and canal transportation; that the grain received at New York in 1887 by way of the Erie Canal and Hudson River, during the season of canal navigation, exceeded 46,000,000 bushels, an amount very largely in excess of the grain received during the same period by rail and by river and coast-wise vessels; that the elevation of that grain from lake vessels to canal-boats takes place at Buffalo, where there are thirty or forty elevators, stationary and floating; that a large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds

its way through the Erie Canal and Hudson River to the seaboard at New York, whence it is distributed to the markets of the world; that the business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities in the business of the common carrier, and in a broad sense performing the work of carriers, being located upon or adjacent to the waters of the State, and transferring the cargoes of grain from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, and thereby performing an essential service in transportation; that by their means the transportation of grain by water from the upper lakes to the seaboard is rendered possible; that the business of elevating grain thus has a vital relation to commerce in one of its most important aspects; that every excessive charge made in the course of the transportation of grain is a tax upon commerce; that the public has a deep interest that no exorbitant charges shall be exacted at any point, upon the business of transportation; and that whatever impaired the usefulness of the Erie Canal as a highway of commerce involved the public interest.

The Court of Appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of Lord Chief Justice Hale, in his treatise *De Portibus Maris* (Harg. Law Tracts, 78); that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen and hackmen, and interest on the use of money; that the underlying principle was, that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation; and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the Erie Canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the State, and the practice of legislation in analogous cases, collectively creating an exceptional case and justifying legislative regulation.

The opinion further said that the criticism to which the case of *Munn v. Illinois* had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberrations might have marked its course.

We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just. . . .

This court, in *Munn v. Illinois*, the opinion being delivered by Chief Justice Waite, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the Fourteenth Amendment. It said, that under the powers of government inherent in every sovereignty, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good;" and that, "in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." It was added: "To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." It announced as its conclusions that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law; that, when private property was devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, innkeeper, wharfinger, baker, cartman or hackney coachman; that they stood in the very gateway of commerce and took toll from all who passed; that their business tended "to a common charge," and had become a thing of public interest and use; that the toll on the grain was a common charge; and that, according to Lord Chief Justice Hale, every such warehouseman "ought to be under a public regulation, viz.," that he "take but reasonable toll."

This court further held in *Munn v. Illinois*, that the business in question was one in which the whole public had a direct and positive interest; that the statute of Illinois simply extended the law so as to meet a new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that, the property being clothed with a public interest, what was a reasonable compensation for its use was not a judicial, but a legislative question; that, in countries where the common law prevailed, it had been customary from time

immemorial for the legislature to declare what should be a reasonable compensation under such circumstances, or to fix a maximum beyond which any charge made would be unreasonable; that the warehouses of Munn and Scott were situated in Illinois and their business was carried on exclusively in that State; that the warehouses were no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another; that their regulation was a thing of domestic concern; that, until Congress acted in reference to their interstate relations, the State might exercise all the powers of government over them, even though in so doing it might operate indirectly upon commerce outside its immediate jurisdiction; and that the provision of § 9 of article 1 of the Constitution of the United States operated only as a limitation of the powers of Congress, and did not affect the States in the regulation of their domestic affairs. The final conclusion of the court was, that the Act of Illinois was not repugnant to the Constitution of the United States; and the judgment was affirmed.

In *Sinking Fund Cases*, 99 U. S. 700, 747, Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn v. Illinois*, speaking of that case, said: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice Bradley regarded as the principle of the decision in *Munn v. Illinois*.

In *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 354, this court said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In *Wabash &c. Railway Co. v. Illinois*, 118 U. S. 557, 569, Mr. Justice Miller, who had concurred in the judgment in *Munn v. Illinois*, referred, in delivering the opinion of the court, to that case, and said: "That case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an Act of Incorporation of any State whatever, and free from the question of continuous transportation through several States. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his

service, could be regulated by Acts of the Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In *Dow v. Beidelman*, 125 U. S. 680, 686, it was said by Mr. Justice Gray, in delivering the opinion of the court, that in *Munn v. Illinois* the court, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," said that to limit the rate of charges for services rendered in the public employment, or for the use of property in which the public has an interest, was only changing a regulation which existed before, and established no new principle in the law, but only gave a new effect to an old one.

In *Chicago &c. Railway Co. v. Minnesota*, 134 U. S. 418, 461, it was said by Mr. Justice Bradley, in his dissenting opinion, in which Mr. Justice Gray and Mr. Justice Lamar concurred, that the decision of the court in that case practically overruled *Munn v. Illinois*; but the opinion of the court did not say so, nor did it refer to *Munn v. Illinois*; and we are of opinion that the decision in the case in 134 U. S. is, as will be hereafter shown, quite distinguishable from the present cases.

It is thus apparent that this court has adhered to the decision in *Munn v. Illinois* and to the doctrines announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the States.

In *Railway v. Railway*, 30 Ohio St. 604, 616, in 1877, it was said, citing *Munn v. Illinois*: "When the owner of property devotes it to a public use, he, in effect, grants to the public an interest in such use, and must, to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use." That was a decision by the Supreme Court Commission of Ohio.

In *State v. Gas Company*, 34 Ohio St. 572, 582, in 1878, *Munn v. Illinois* was cited with approval, as holding that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use; and the court added that in *Munn v. Illinois* the principle was applied to warehousemen engaged in receiving and storing grain; that it was held that their rates of charges were subject to legislative regulation; and that the principle applied with greater force to corporations when they were invested with franchises to be exercised to subserve the public interest.

The Supreme Court of Illinois, in *Ruggles v. People*, 91 Illinois, 256, 262, in 1878, cited *Munn v. People*, 69 Illinois, 80, which was

affirmed in *Munn v. Illinois*, as holding that it was competent for the General Assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling and shipping grain, and that, too, when such persons had derived no special privileges from the State, but were, as citizens of the State, exercising the business of storing and handling grain for individuals.

The Supreme Court of Alabama, in *Davis v. The State*, 68 Alabama, 58, in 1880, held that a statute declaring it unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. Against the argument that the statute was such a despotic interference with the rights of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law," the court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police regulation, to which there was no constitutional objection, citing *Munn v. Illinois*. It added, that the object of the statute was to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which, in the opinion of the law-making power, might do much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory.

In *Baker v. The State*, 54 Wisconsin, 368, 373, in 1882, *Munn v. Illinois* was cited with approval by the Supreme Court of Wisconsin, as holding that the Legislature of Illinois had power to regulate public warehouses, and the warehousing and inspection of grain within that State, and to enforce its regulations by penalties, and that such legislation was not in conflict with any provision of the Federal Constitution.

The Court of Appeals of Kentucky, in 1882, in *Nash v. Page*, 80 Kentucky, 539, 545, cited *Munn v. Illinois*, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.

In 1884, the Supreme Court of Pennsylvania, in *Girard Storage Co. v. Southwark Co.*, 105 Penn. St. 248, 252, cited *Munn v. Illinois* as involving the rights of a private person, and said that the principle involved in the ruling of this court was, that where the owner of such property as a warehouse devoted it to a use in which the public had an interest, he in effect granted to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by the public for the common good, as long as he maintained that use.

In *Sawyer v. Davis*, 136 Mass. 239, in 1884, the Supreme Judicial Court of Massachusetts said that nothing is better established than the

power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced; and *Munn v. Illinois* was cited as holding that the rules of the common law which had from time to time been established, declaring or limiting the right to use or enjoy property, might themselves be changed as occasion might require.

The Supreme Court of Indiana, in 1885, in *Brechbill v. Randall*, 102 Indiana, 528, held that a statute was valid which required persons selling patent rights to file with the clerk of the county a copy of the patent, with an affidavit of genuineness and authority to sell, on the ground that the State had power to make police regulations for the protection of its citizens against fraud and imposition; and the court cited *Munn v. Illinois* as authority.

The Supreme Court of Nebraska, in 1885, in *Webster Telephone Case*, 17 Nebraska, 126, held that when a corporation or person assumed and undertook to supply a public demand, made necessary by the requirements of the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination; and *Munn v. Illinois* was cited by the prevailing party and by the court. The defendant was a corporation, and had assumed to act in a capacity which was to a great extent public, and had undertaken to satisfy a public want or necessity, although it did not possess any special privileges by statute or any monopoly of business in a given territory; yet it was held that, from the very nature and character of its business, it had a monopoly of the business which it transacted. The court said that no statute had been deemed necessary to aid the courts in holding that where a person or company undertook to supply a public demand, which was "affected with a public interest," it must supply all alike who occupied a like situation, and not discriminate in favor of or against any.

In *Stone v. Yazoo & Miss. Valley R. Co.*, 62 Mississippi, 607, 639, the Supreme Court of Mississippi, in 1885, cited *Munn v. Illinois* as deciding that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, was a thing of domestic concern and pertained to the State, and as affirming the right of the State to regulate the business of one engaged in a public employment therein, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

In *Hockett v. The State*, 105 Indiana, 250, 258, in 1885, the Supreme Court of Indiana held that a statute of the State which prescribed the maximum price which a telephone company should charge for the use of its telephones was constitutional, and that in legal contemplation all the instruments and appliances used by a telephone

company in the transaction of its business were devoted to a public use, and the property thus devoted became a legitimate subject of legislative regulation. It cited *Munn v. Illinois* as a leading case in support of that proposition, and said that although that case had been the subject of comment and criticism, its authority as a precedent remained unshaken. This doctrine was confirmed in *Central Union Telephone Co. v. Bradbury*, 106 Indiana, 1, in the same year, and in *Central Union Telephone Co. v. The State*, 118 Indiana, 194, 207, in 1888, in which latter case *Munn v. Illinois* was cited by the court.

In *Chesapeake & Potomac Telephone Co. v. Balto. & Ohio Telegraph Co.*, 66 Maryland, 399, 414, in 1886, it was held that the telegraph and the telephone were public vehicles of intelligence, and those who owned or controlled them could no more refuse to perform impartially the functions which they had assumed to discharge than a railway company, as a common carrier, could rightfully refuse to perform its duty to the public; and that the legislature of the State had full power to regulate the services of telephone companies, as to the parties to whom facilities should be furnished. The court cited *Munn v. Illinois*, and said that it could no longer be controverted that the legislature of a State had full power to regulate and control, at least within reasonable limits, public employments and property used in connection therewith; that the operation of the telegraph and the telephone in doing a general business was a public employment, and the instruments and appliances used were property devoted to a public use and in which the public had an interest; and that, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good.

In the Court of Chancery of New Jersey, in 1889, in *Delaware, &c. Railroad Co. v. Central Stock-Yard Co.*, 45 N. J. Eq. 50, 60, it was held that the legislature had power to declare what services warehousemen should render to the public, and to fix the compensation that might be demanded for such services; and the court cited *Munn v. Illinois* as properly holding that warehouses for the storage of grain must be regarded as so far public in their nature as to be subject to legislative control, and that when a citizen devoted his property to a use in which the public had an interest, he in effect granted to the public an interest in that use, and rendered himself subject to control, in that use, by the body politic.

In *Zanesville v. Gas-Light Company*, 47 Ohio St. 1, in 1889, it was said by the Supreme Court of Ohio, that the principle was well established, that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use; and that such was the point of the decision in *Munn v. Illinois*.

We must regard the principle maintained in *Munn v. Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, as well as in respect to the charge for trimming and shovelling to the leg of the elevator when loading, and trimming the cargo when loaded. If the shovellers or scoopers chose, they might do the shovelling by hand, or might use a steam-shovel. A steam-shovel is owned by the elevator owner, and the power for operating it is furnished by the engine of the elevator; and if the scooper uses the steam-shovel, he pays the elevator owner for the use of it.

The answer to the suggestion that by the statute the elevator owner is forbidden to make any profit from the business of shovelling to the leg of the elevator is that made by the Court of Appeals of New York in the case of Budd, that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator owner, beyond the sum specified for the use of his machinery in shovelling and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner was permitted to separate the services, and to charge for the use of his steam-shovel any sum which might be agreed upon between himself and the shovellers' union, and thereby, under color of charging for the use of his steam-shovel, to exact of the carrier a sum for elevating beyond the rate fixed by the statute.

We are of opinion that the Act of the Legislature of New York is not contrary to the Fourteenth Amendment to the Constitution of the United States, and does not deprive the citizen of his property without due process of law; that the Act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shovelling to the actual cost thereof; and that it is a proper exercise of the police power of the State.

On the testimony in the cases before us the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers. The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner,

who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

It is contended in the briefs for the plaintiffs in error in the Annan and Pinto cases that the business of the relators in handling grain was wholly private, and not subject to regulation by law; and that they had received from the State no charter, no privileges and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any other individual in the community. But these same facts existed in *Munn v. Illinois*. In that case, the parties offending were private individuals, doing a private business, without any privilege or monopoly granted to them by the State. Not only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character. The Act is also constitutional as an exercise of the police power of the State.

So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the State of New York. It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn v. Illinois*. It is of the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws.¹ . . .

In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable.

In *Georgia Banking Co. v. Smith*, 128 U. S. 174, 179, in the opinion of the court, delivered by Mr. Justice Field, it was said that this court had adjudged in numerous instances that the legislature of a State had the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any contract to the contrary, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.

It is further contended for the plaintiffs in error that the statute in question violates the Fourteenth Amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies

¹ For a passage omitted here, see *ante*, p. 671. — Ed.

only to places which have 130,000 population or more, and does not apply to places which have less than 130,000 population, and thus operates against elevator owners in the larger cities of the State. The law operates equally on all elevator owners in places having 130,000 population or more; and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the Fourteenth Amendment.

Judgments affirmed.

[BREWER, J., gave a dissenting opinion in which FIELD, J., and BROWN, J., concurred.] *Brewer v. M.A. Oak, 53 N. 2. 151*

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LAWTON v. STEELE.

SUPREME COURT OF THE UNITED STATES. 1894.

[14 Sup. Court Rep. 499.]

IN error to the Supreme Court of the State of New York.

This was an action at law instituted in the Supreme Court for the county of Jefferson by the plaintiffs in error against the defendant in error, together with Edward L. Sargent and Richard U. Sherman, for the conversion of fifteen hoop and fyke nets of the alleged value of \$525. Defendants Steele and Sargent interposed a general denial. Defendant Sherman pleaded that he, with three others, constituted the "Commissioners of Fisheries" of the State of New York, with power to give directions to game and fish protectors with regard to the enforcement of the game law; that defendant Steele was a game and fish protector, duly appointed by the Governor of the State of New York, and that the nets sued for were taken possession of by said Steele, as such game and fish protector, upon the ground that they were maintained upon the waters of the State in violation of existing statutes for the protection of fish and game, and thereby became a public nuisance.

The facts were undisputed. The nets were the property of the plaintiffs, and were taken away by the defendant Steele, and destroyed. At the time of the taking, most of the nets were in the waters of the Black River Bay, being used for fishing purposes, and the residue were upon the shore of that bay, having recently been used for the same purpose. The plaintiffs were fishermen, and the defendant Steele was a State game and fish protector. The taking and destruction of the nets were claimed to have been justifiable under the statutes of the State relating to the protection of game and fish. Plaintiffs claimed there was no justification under the statutes, and if they constituted such justification upon their face, they were unconstitutional. (Defendant Sherman was a State Fish Commissioner. Defendant Sargent was President of the Jefferson County Fish and Game Association.) Plaintiffs claimed these defendants to be liable upon the ground that they instigated, incited, or directed the taking and destruction of the nets.

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Action at Law for the conversion of some fish nets. Nets were the property of plaintiffs and were taken away by defendant and destroyed as they had been used for fishing purposes in violation of a statute of N.Y. which declared such nets so used to be public nuisances and it was made the duty of any game and fish protector to destroy them.

Plff. contended the act was unconstitutional as it deprived the citizen of his property w/o. due process of law. Endot. for

declared constitutional. The Legislature possesses the right
 under the police power to protect and preserve the fish
 within its 818 borders and LAWTON v. STEELE. may use [CHAP. V. any
 Upon trial before a jury a verdict was rendered, subject to the opinion
 of the court, in favor of the plaintiffs against defendant Steele for
 the sum of \$216, and in favor of defendants Sargent and Sherman.
 A motion for a new trial was denied, and judgment entered upon the
 verdict for \$216 damages and \$166.09 costs. On appeal to the General
 Term this judgment was reversed, and a new trial ordered, and a further
 appeal allowed to the Court of Appeals. On appeal to the Court
of Appeals, the order of the General Term granting a new trial was
affirmed, and judgment absolute ordered for the defendant. 119 N. Y.
 226. Plaintiffs thereupon sued out a writ of error from this court.
 Leri H. Brown, for plaintiffs in error.
 Elon R. Brown, for defendant in error.
 MR. JUSTICE BROWN, after stating the facts in the foregoing language,
 delivered the opinion of the court.
 This case involves the constitutionality of an Act of the Legislature
 of the State of New York known as chapter 591, Laws of New York of
 1880, as amended by chapter 317, Laws of New York of 1883, entitled
 "An Act for the Appointment of Game and Fish Protectors."
 By a subsequent Act enacted in 1886:
 "Section 1. No person shall at any time kill or take from the waters
 of Henderson Bay or Lake Ontario, within one mile from the shore,
 between the most westerly point of Pillar Point and the boundary line
 between the counties of Jefferson and Oswego, . . . any fish of any
 kind by any device or means whatever otherwise than by hook and line
 or rod held in hand. But this section shall not apply to or prohibit the
 catching of minnows for bait, providing the person using nets for that
 purpose shall not set them, and shall throw back any trout, bass, or
 any other game fish taken, and keep only chubs, dace, suckers, or
 shiners.
 "Sec. 2. Any person violating any of the provisions of this Act
 shall be guilty of a misdemeanor, and liable to a penalty of \$50 for
 each offence." Laws, 1886, c. 141.
 By the Act of 1880, as amended by the Act of 1883:
 "Sec. 2. Any net, pound, or other means or device for taking or
capturing fish, or whereby they may be taken or captured, set, put,
floated, had, found, or maintained, in or upon any of the waters of this
State, or upon the shores of or islands in any of the waters of this
State, in violation of any existing or hereafter enacted statutes or laws
for the protection of fish, is hereby declared to be, and is, a public
nuisance, and may be abated and summarily destroyed by any person,
and it shall be the duty of each and every protector aforesaid and of
every game constable to seize and remove and forthwith destroy the
same, . . . and no action for damages shall lie or be maintained
against any person for or on account of any such seizure and
destruction."
 This last section was alleged to be unconstitutional and void for
 three reasons: (1) as depriving the citizen of his property without due
process of law and would tend in some measure
 impair the efficacy of the statute.
 (2) as depriving the citizen of his property without due
process of law on the ground that the legislature has no power

process of law; (2) as being in restraint of the liberty of the citizen; (3) as being an interference with the admiralty and maritime jurisdiction of the United States.

The trial court ruled the first of the above propositions in plaintiffs' favor, and the others against them, and judgment was thereupon entered in favor of the plaintiffs.

The constitutionality of the section in question was, however, sustained by the General Term and by the Court of Appeals, upon the ground of its being a lawful exercise of the police power of the State.

The extent and limits of what is known as the "police power" have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial-grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling-houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27; *Kidd v. Pearson*, 123 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. . . . [Here reference is made to *Henderson v. Mayor*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 265; *R. R. Co. v. Husen*, 95 U. S. 465; *Rockwell v. Nearing*, 35 N. Y. 302; *Austin v. Murray*, 16 Pick. 121; *Watertown v. Mayo*, 109 Mass. 315; *The Slaughter-House Cases*, 16 Wall. 36; *In re Cheesbrough*, 78 N. Y. 232; and *Brown v. Perkins*, 12 Gray, 89.]

it. No rule can be fixed.

The subject of nuisances is in criminal law dangerously indefinite and vague.

abatement summarily without any opportunity to be heard. Value of the article should not affect the principle involved.
Such things have always been done.
In 12 C.
The finding in a case where fish nets were destroyed in such a manner.
Is the value of the article a factor?
He thinks not.
Can you destroy anything that is a nuisance?
Some portion of destroying property that is declared to be a nuisance has always been recognized.
Can a house be destroyed because it is for illegal purposes?
Probably.
precedent

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to value
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The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. Thus in *Smith v. Maryland*, 18 How. 71, it was held that the State had a right to protect its fisheries in Chesapeake Bay by making it unlawful to take or capture oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. The avowed object of the Act was to prevent the destruction of the oysters by the use of particular instruments in taking them. "It does not touch," said the court, "the subject of the common liberty of taking oysters save for the purpose of guarding it from injury to whom it may belong and by whomsoever it may be enjoyed." It was held that the right of forfeiture existed, even though the vessel was enrolled for the coasting trade under the Act of Congress. So in *Smith v. Lerinus*, 8 N. Y. 472, a similar Act was held to be valid, although it vested certain legislative powers in boards of supervisors, authorizing them to make laws for the protection of shell and other fish. In *State v. Roberts*, 59 N. H. 256, which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the court: "At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and, therefore, it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." *Commonwealth v. Chapin*, 5 Pick. 199; *McCready v. Virginia*, 94 U. S. 391; *Vinton v. Welsh*, 9 Pick. 92; *Commonwealth v. Essex Co.*, 13 Gray. 248; *Phelps v. Racey*, 60 N. Y. 10; *Holyoke Co. v. Lyman*, 15 Wall. 500; *Gentile v. State*, 29 Ind. 409; *State v. Lewis*, 33 N. E. R. 1024.

As the waters referred to in the Act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker v. Cummings*, 20 Johns. 91. The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

The main, and only real difficulty connected with the Act in question is in its declaration that any net, &c., maintained in violation of any

law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offence, and to take such measures as were reasonable and necessary to prevent such offences in the future. It certainly could not do this more effectually than by destroying the means of the offence. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them. *Hart v. The Mayor*, 9 Wend. 571; *Meeker v. Van Rensselaer*, 15 Wend. 397. An Act of the Legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark, &c. Rwy Co. v. Hunt*, 50 N. J. Law, 308; *Blasier v. Miller*, 10 Hun, 435; *Mouse's Case*, 12 Coke, 62; *Stone v. The Mayor*, 25 Wend. 173; *Am. Print Works v. Lawrence*, 21 N. J. Law, 248; *Same v. Same*, 23 Id. 590.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of

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a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling-room.

The value of the nets in question was but \$15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a State in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offences before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. *Callan v. Wilson*, 127 U. S. 540, and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the Act in question without his legal remedy. If in fact his property has been used in violation of the Act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case (*Am. Print Works v. Lawrence*, 21 N. J. Law, 248, 259): "The party is not, in point of fact, deprived of a trial by jury. The

evidence necessary to sustain the defence is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the Act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (*Ely v. Supervisors*, 36 N. Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People v. West*, 106 N. Y. 293), and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

In *Weller v. Snover*, 42 N. J. Law, 341, it was held that a fish warden for a county, appointed by the Governor, had the right, under an Act of the Legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that "after a statute has declared an invasion of a public right to be a nuisance it may be abated by the destruction of the object used to effect it. The person who, with actual or constructive notice of the law, sets up such nuisance cannot sue the officer whose duty it has been made by the statute to execute its provisions." So in *Williams v. Blackwall*, 2 H. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the Act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value (*Jeck v. Anderson*, 57 Cal. 251, boats as well as nets; *Dunn v. Burleigh*, 62 Me. 24, teams and supplies in lumbering; *King v. Hayes*, 80 Me. 206, a horse) — in others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. *Lowry v. Rainwater*, 70 Mo. 152; *State v. Robbins*, 124 Ind. 308; *Ridgeway v. West*, 60 Ind. 371.

Upon the whole, we agree with the Court of Appeals in holding this

Act to be constitutional, and the judgment of the Supreme Court is, therefore *Affirmed.*

MR. CHIEF JUSTICE FULLER (with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BREWER) dissenting.

In my opinion the legislation in question, so far as it authorizes the summary destruction of fishing-nets and prohibits any action for damages on account of such destruction, is unconstitutional.

Fishing-nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the legislature of a State the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

The police power rests upon necessity and the right of self-protection but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing-nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that that argument is to be deprecated as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guarantees.

I am, therefore, constrained to withhold my assent to the judgment just announced, and am authorized to say that Mr. Justice Field and Mr. Justice Brewer concur in this dissent.¹

¹ See *State v. Lewis*, 33 N. E. Rep. 1024 (Ind., April, 1893), holding valid a statute making it criminal to have in one's possession a gill net or seine, with certain exceptions. And so as to gaming implements, *Hastings v. Haug*, 85 Mich. 87 (1891). — Ed.

GODDARD, PETITIONER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[16 Pick. 504.]

PETITION for a *certiorari* to the Municipal Court for the city of Boston.

In January 1835, the city marshal of Boston made a complaint to the Police Court, in the name of the Commonwealth, against Goddard, as the occupant of a house and lot of land situate on Kingston Street, in the city of Boston, and not in that part of the city called South Boston, for neglecting and refusing to remove the snow from the sidewalk in Kingston Street, adjacent to his land. The defendant was sentenced to pay a fine and costs, and he appealed to the Municipal Court.

At the trial in that court it was admitted, that the facts alleged in the complaint were true. *S. D. Parker*, County Attorney, and *B. R. Curtis*, in support of the complaint, read the 17th section of the city ordinance passed on August 22, 1833, *viz.*, that "the tenant, occupant, and in case there shall be no tenant, the owner of any building or lot of land bordering on any street, lane, court, or public place within the city (excepting that part of the city called South Boston), where there is any footway or sidewalk, shall after the ceasing to fall of any snow, if in the day time, within six hours, and if in the night time, before two of the clock in the afternoon succeeding, cause the same to be removed therefrom; and in default thereof shall forfeit and pay a sum not less than one dollar, and not more than four dollars, for each and every day that the same shall afterwards remain on such footway or sidewalk;" also, the clause from the 15th section of the city charter (St. 1821, c. 110,) which declares, "that the mayor and aldermen and common council of the said city shall have power to make all such needful and salutary by-laws, as towns, by the laws of this Commonwealth, have power to make and establish; and to annex penalties, not exceeding twenty dollars, for the breach thereof;" also the clause in St. 1785, c. 75, § 7, which empowers the inhabitants of any town "to make and agree upon such necessary rules, orders, and by-laws for the directing, managing, and ordering the prudential affairs of such towns, as they shall judge most conducive to the peace, welfare and good order thereof." . . .

The defendant's counsel moved the court to instruct the jury, that the by-law in question was inoperative and void. . . . But the judge instructed the jury that the by-law was valid and effectual. . . .

The jury found a verdict against the defendant, and he was sentenced to pay a fine of four dollars and costs of suit.

The defendant filed exceptions to the instructions of the judge, and now petitioned for a *certiorari* in order that the sentence might be reversed.

but necessary and annex and imposing the duty on them exclusively. Held, it was not a tax the ordinance not being made for purposes of revenue. It was a mere police regulation requiring duty

There was an ordinance in Boston requiring occupant owners of house to remove from

their sidewalk
-walkers
snow
in a few
hours after
it had fallen
under penalty
of a small
fine for each
day of non-removal.
The petitioners
being sentenced
to pay the fine for
violating the ordinance
contended
that it was
uncon-
stitutional
that it imposed
an unequal
tax on property

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perform it and for the advantage of a populous city
to clear a way from the sidewalk in front of his land
 Bartlett insisted on the exceptions.

C. P. Curtis, in behalf of the city of Boston.

Shaw, C. J., delivered the opinion of the court. No question is made of the facts in this case, but it is conceded, that the petitioner did not clear the sidewalk in front of his land, in the manner required by the by-law of the city, and he justifies this on the ground that the law itself is invalid and of no binding force. For the purpose of having this question deliberately considered, and for the purpose of taking several exceptions to the course of proceedings, the petitioner has prayed for a writ of *certiorari* to the Municipal Court. . . .

3. Another, and perhaps the most important objection, is, that the by-law is one imposing a tax or duty upon the citizens, and it is a violation of the Constitution in this, that it is partial, and unequal, and contravenes that fundamental maxim of our social system, that all burdens and taxes laid on the people for the public good shall be equal.

But the court are all of opinion, that the by-law in question is not obnoxious to this objection.

It is not speaking strictly, to characterize this city ordinance as a law levying a tax, the direct or principal object of which is, the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class.

It is said to be unequal, because it singles out a particular class of citizens, to wit, the owners and occupiers of real estate, and imposes the duty exclusively upon them.

If this were an arbitrary selection of a class of citizens, without reference to their peculiar fitness and ability to perform the duty, the objection would have great weight, as for instance, if the expense of clearing the streets of snow were imposed upon the mechanics, or merchants, or any other distinct class of citizens, between whose convenience and accommodation, and the labor to be done, there is no natural relation. But suppose there is a class of citizens who will themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit, shall by a general and equal law be required to do it. Supposing a by-law should require every inhabitant, who keeps a cart, truck or other team, or a coach or other carriage, to turn out himself or send a man, with one or more horses, after each heavy fall of snow, to assist in levelling it. Although other citizens would derive a benefit,

yet as these derive some peculiar benefit, accompanied with the ability, I can at present perceive no valid objection to a by-law requiring it, on the ground of inequality. Supposing a general regulation, that at certain seasons of the year, every shopkeeper should sprinkle the sidewalk in front of his own shop, or sweep it, inasmuch as he has a peculiar benefit, and as the duty is equal upon all who come within the description, it seems to us to be equal, in the sense in which the law requires all such burdens to be equal. And it appears to us that the case before us is similar. Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar-door and steps, a passage for fuel, and the passage to and from his own house to the street. To some purposes, therefore, it is denominated his sidewalk. For his own accommodation, he would have an interest in clearing the snow from his own door. The owners and occupiers of house-lots and other real-estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community.

Besides, from their situation, they have the power and ability to perform this duty, with the promptness which the benefit of the community requires, and the duty is divided, distributed and apportioned upon so large a number, that it can be done promptly and effectually, and without imposing a very severe burden upon any one. Supposing a by-law should require, what is often done, in practice, that upon an alarm of fire in the night, all householders, on streets leading to and near the fire, should exhibit a light. This would seem to be reasonable. Or that all the owners or occupiers of dwelling-houses, having a well and pump, should keep them in repair at their own expense, to be used in case of fire. It would operate partially, but it seems to us not unequal, in the sense in which we are using that term. The city might keep persons ready in every street, to light torches and flambeaux in case of fire, and the expense be paid from the treasury; still, it appears to me, that as householders would derive a benefit from the operation of this general regulation, as their local situation puts it peculiarly within their power and ability to perform it without great expense, and as it is equal in its terms, it would not be obnoxious to the charge of being invalid for partiality and inequality.

In all these cases the answer to the objection of partiality and inequality is, that the duty required is a duty upon the person in respect to the property which he holds, occupies and enjoys, under the protection and benefit of the laws, that it operates upon each and all in their turns, as they become owners or occupiers of such estates, and it ceases to be required of them, when they cease to be thus holders and occupiers of the estate, in respect to which the duty is required. In this respect it is like a land tax, or house tax, it does not bear upon owners of per-

sonal property, and therefore does not bear upon all citizens alike, but is not on that account unequal or partial, in the sense contemplated by the Declaration of Rights, requiring all taxes and burdens to be equal and impartial.

The court are all of opinion, that as a by-law, the regulation in question was a reasonable one, that it was not repugnant to the Constitution or laws of the Commonwealth, and that the conviction was right.

Petition dismissed.

Def. was found guilty of
violating a city ordinance
requiring the removal
of snow from the
sidewalk within six
hours after
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remove has no more interest in it than the rest of the public.

GRIDLEY v. BLOOMINGTON.

SUPREME COURT OF ILLINOIS. 1878.

[88 Ill. 554]

APPEAL from the Circuit Court of McLean County.

Complaint, under oath, was made, charging that defendant permitted snow to remain upon the sidewalk abutting on premises occupied by him as a "wood and stable lot," contrary to an ordinance of the city which provides, that "whoever, being the occupant of any occupied premises, or the owner of any vacant premises, shall suffer any snow to remain on any sidewalk or footway adjacent thereto longer than six hours from the time it ceases falling, or if the cessation be in the night time, then longer than six hours after sunrise on the next morning, shall be fined five dollars, and be subject to a like penalty for each day such snow so remains after the first penalty has been incurred."

Proof was made that defendant, on the 16th day of February, 1875, owned and occupied Lot 3, in White's addition to Bloomington, as a wood and stable lot; that there was a sidewalk on the south side of the lot, which abutted on Grove Street; that defendant did not remove the snow that had fallen on the sidewalk, two or three days before, to the depth of several inches, within six hours after sunrise on the day mentioned in the complaint, and that the sidewalk in question was within the corporate limits of the city.

It was admitted for the defence, that White's addition to Bloomington was laid out by James White on the 7th day of April, 1836.

On the trial, defendant was found guilty, and fined in the sum of three dollars, and from the judgment rendered against him defendant prosecutes his appeal to this court.

Mr. E. M. Prince, and Messrs. Karr & Karr, for the appellant.

MR. JUSTICE SCOTT delivered the opinion of the court:—

The ordinance under which defendant was prosecuted, imposes a fine upon any one who shall permit snow to remain upon the sidewalk abutting premises occupied or owned by him, longer than a period of six hours after it ceases to fall, or if the cessation is in the night time, then longer than six hours after sunrise on the next morning. The validity

In Ills. the lot owner does not own the fee in the street.

is the rest of the public should therefore have no greater duty than others to keep it free from snow. The ordinance could not be sustained as an exercise of the police power.

of that ordinance is the only question made on the argument. It was admitted the lot occupied by defendant was one of an addition to Bloomington that was laid out in 1836, and hence it follows, under the decisions of this court, the fee of the street in front of the premises was either in the original proprietor or in the corporation. *Indianapolis, Bloomington & Western R. R. Co. v. Hartley*, 67 Ill. 439; *Gebhardt v. Reeves*, 75 Id. 301.

The public had an easement over the street in front of the lot occupied and owned by defendant, and it makes no difference, so far as this decision is concerned, whether the fee of the street passed by the plat and dedication to the corporation, or whether it remained in the original proprietor. It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons travelling on foot, and is as much under the control of the municipal government as the street itself. The owner of the adjacent lot is under no more obligation to keep the sidewalk free from obstructions, than he is the street in front of his premises. He may not himself obstruct either so as to impede travel on foot or in carriages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow or anything else that might impede travel; then, upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city? It is certainly not upon the principle under which assessments are made against the owner for building sidewalks in front of his property. The cases are not analogous. Such assessments are maintained on the ground the sidewalk enhances the value of the property, and to the extent of the special benefits conferred they are held to be valid.

It would be absurd to suppose that assessments for benefits for local improvements could be enforced by fines or penalties, as in the ordinance under which defendant was fined. Nor do we think this ordinance can be upheld as an exercise of the police power inherent in all municipal governments. It was expressly decided by this court, in *City of Ottawa v. Spencer*, 40 Ill. 211, that local improvements of either sidewalks or streets cannot be compelled, under the general police power. The legislature must afford the necessary power for constructing all needful improvements, subject to constitutional limitations; and when one mode of making such improvements is sanctioned by the Constitution, no other can be adopted.

Keeping streets and sidewalks in repair, and free from obstructions that impede travel or render it dangerous, is referable to the same power as for constructing new improvements. The sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and, upon principle, it follows, the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions

would be no means whatever of compelling me to build a walk in front of his place. This sentence must be wrong. Police power must extend to such a case as compelling me to build a walk.

in front of his property at his own expense, any more than the street itself, either by the exercise of the police power or by fines and penalties imposed by ordinance, or by direct legislative action.

Our conclusion is, the ordinance in question is invalid, and the judgment must be reversed and the cause remanded.

*Judgment reversed.*¹

¹ The doctrine of this case was affirmed in *Chicago v. O'Brien*, 111 Ill. 532 (1884). The court (SCHOLFIELD, C. J.) said: "It is conceded by counsel for appellant that this court, in *Gridley v. City of Bloomington*, 88 Ill. 554, decided the only question involved in this case (namely, the validity of the ordinance under which the suit is prosecuted) against appellant; but they contend that decision is based upon incorrect grounds, and should therefore be overruled. They contend that the ordinance is but a proper police regulation, and that, as such, it should be sustained. In support of this position they cite *Bonsall et ux. v. Mayor, etc.*, 19 Ohio, 418; *Paxton v. Sweet*, 13 N. J. (1 Green) 196; *Mayor, etc. v. Maberry*, 6 Humph. 368; *Washington v. Mayor, etc.*, 1 Swan (Tenn.), 177; *Woodbridge v. City of Detroit*, 8 Mich. 274; and other cases.

"In *City of Chicago v. Larned*, 34 Ill. 203, — a case very elaborately argued by able counsel, — the principle involved in the decisions of these cases was carefully considered, and it was held they could not apply here, — that they were decided under constitutions so materially different from ours, that the same line of reasoning is not applicable to both. And in *City of Ottawa v. Spencer*, 40 Ill. 211, which was a proceeding to charge the adjacent lot-owner with the cost of building a sidewalk, the same question was again before the court, and it was then insisted, as it is now, that the charges may be sustained as within the police power, but the position was held untenable. In passing upon this point, it was there said: 'It is also urged that this may be referred to the police power of the State, which has been delegated to the city, and may therefore be properly exercised; and in support of the proposition we are referred to the decisions of the Supreme Court of Tennessee: *Mayor, etc. v. Maberry*, 6 Humph. 368; *Washington v. The Mayor and Aldermen of Nashville*, 1 Swan, 177; *White v. The Mayor and Aldermen of Nashville*, 2 Id. 364. These cases go to the length of sustaining the doctrine contended for by plaintiffs in error. They announce the doctrine that such improvements may be compelled under the general police power. If this be so, by an exercise of the same power we presume that the owner could be compelled to construct and keep in repair public roads, bridges, and culverts fronting upon or running through his lands, or the owner of a city or village lot could be compelled to make and repair the street in front of his property. A sidewalk is a portion of a public highway, appropriated, it is true, to pedestrians alone, but still open and free to all persons desiring to use and enjoy it as a public highway. It is as much a public highway in the mode of its use as the street itself. The difference in the manner of their use does not render one public more than the other. They are both free to be properly used and enjoyed by the entire public, and are constructed alike for their use. That the legislature may afford the necessary power of constructing such improvements so essentially necessary to the comfort and convenience of the community is apparent; but under our Constitution we think the mode authorized in this case is not sanctioned, and that the principles announced in the case of *Larned v. The City of Chicago* fully govern and control this case.'

"Even the police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc. And upon like principle, a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation. The drainage of malarial swamps would surely largely contribute to promote the public health; but could it be contended that therefore the burden of such

IN *Carthage v. Frederick*, 122 N. Y. 268, 277 (1890), in sustaining the constitutionality of a local ordinance of the same sort as that in the case of *Goddard*, Petitioner, the Court of Appeals (Second Division), VANN, J., said: "If this power of local legislation can be conferred upon the largest city in the State, it can also be conferred upon the smallest village that the legislature sees fit to incorporate. In this latitude the accumulation of snow upon sidewalks in large quantities is a matter of course. Its presence retards travel, interrupts business, and interferes with the safety and convenience of all classes. It is a frequent cause of accidents and thus affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city, with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so. We think that the ordinance under consideration is valid; that it conflicts with no provision of the Constitution, and that it is the duty of the courts to enforce it."

"In reaching this conclusion, we have not overlooked the case of *Gridley v. City of Bloomington*, 88 Ill. 554, but have given it the

drainage may be laid upon some single person to be arbitrarily selected, or upon those who happen to own the adjacent dry land, in disregard of the principles applicable to special assessments and special taxation? Undoubtedly, the allowing of ice or snow to remain upon a sidewalk may be declared a nuisance, but it must be a public nuisance, and one, too, not caused by the act of the adjacent property holder, but solely by the action of the elements. No one questions the right of the municipality to prevent such use of property and such action of the citizen as may be injurious to the public; but the adjacent lot-owner has no ownership or control of the adjacent street, and this ordinance seeks to control the action of no one while on the street. The lot-owner is held responsible solely and simply for the accident of owning property near the nuisance. He may have no more actual control of the street, or necessity to use it, than if his property were miles away; still, he is held responsible for a result he could not control, and to the production of which he did not even theoretically contribute. The gist of the whole argument is merely that it is convenient to hold him responsible. It is not perceived why it would not be equally convenient to hold him responsible for the entire police government of so much of the street.

"Counsel seem to wish to draw a distinction between the present case and the cases of *City of Chicago v. Larned*, and *City of Ottawa v. Spencer*, *supra*, upon the ground that it is here neither sought to construct nor repair a sidewalk, but simply to keep it in a passable condition. But the difference is in the extent and not in the character of the burden sought to be imposed. The principle is precisely the same in each case. The object is to fit the streets, or so much as is occupied by sidewalks, for travel; and if the power to compel the private person to accomplish this result exists at all, it must extend to the necessary means in each case. It is impossible to point out why the removal of a snow-bank should rest on a different principle from that applicable to filling a hole, or nailing down a board.

"We are satisfied with the entire correctness of the ruling in *Gridley v. City of Bloomington*, *supra*, and being so satisfied, the judgment below must be affirmed."

Judgment affirmed.

DICKEY, SHELDON, and CRAIG, JJ., dissenting. — ED.

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attention to which it is entitled by the high standing of the court that decided it. The argument upon which the opinion in that case rests is that, as the fee of the street was in the corporation, and the sidewalk was a part of the street, the lot-owner had no more interest in the sidewalk in front of his premises than any other citizen of the municipality, because it was set apart for the exclusive use of persons travelling on foot and was as much under the control of the municipal government as the street itself.

"We are unable to yield to this reasoning, because it overlooks not only the public safety and general convenience, but also the peculiar interest that every owner or occupant of real property has in a clean sidewalk in front of his own premises. Whatever adds to the usefulness of a sidewalk adds both to the rental and permanent value of the adjacent lot.

"After carefully examining all of the questions presented by counsel, we think the judgment should be affirmed."

All concur except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

REINKEN v. FUEHRING.

SUPREME COURT OF INDIANA. 1891.

[130 Ind. 382.]

APPEAL from Circuit Court, Marion County; E. A. BROWN, JUDGE.

Action by Fred. Fuehring and others against Henry Reinken, Sr., to foreclose a lien on defendant's real estate. Defendant appeals from a judgment overruling his demurrer to the complaint. Affirmed.

Denny & Elliott, for appellant.

Augustus L. Mason, for appellees.

COFFEY, J. The appellees brought this suit in the Marion County Circuit Court to foreclose a lien for the amount assessed against the appellant's real estate for sweeping the street in front of his property in the city of Indianapolis, under a contract made between the city and the appellees pursuant to the provisions of the city charter. A demurrer to the complaint was overruled, and the appellees had judgment, from which this appeal is prosecuted. The charter of the city of Indianapolis is found in Acts Gen. Assem. 1891, p. 137. It provides for the mode of improving the streets, and the payment for such improvements; and confers on the city, through its proper officers, the power to make contracts for sprinkling and sweeping such streets in the city as it may deem proper, and to assess against the property holders abutting on such streets the cost of such sprinkling and sweeping. The only question before us for decision relates to the constitutionality of so much of the Act as authorizes the city to contract for sprinkling and sweeping the streets at the cost of the property holders along the line of such

demurrer was contended that the act violated a provision of the State Constitution requiring an equal and uniform rate of taxation and that a property owner could not be compelled to pay for

other streets as provided for in the Act.
Held, this was an assessment and not a tax. The abutting property owner has a special interest in keeping the street and sidewalks free from filth. He may be assessed to be required to pay the expense of such sweeping. It is a local regulation and does not amount to a taking of property for compensation and no legal process is required. As he is supposed to be specially benefitted by the increase in value of his property, he can not complain that he is to bear his

streets, it being contended by the appellant that these provisions are unconstitutional for the reasons: First. That it violates the provision of our State Constitution requiring an equal and uniform rate of taxation. Second. Because, even if the city has power to compel abutting property owners to pay for sweeping the streets in front of their property, it has no power to compel them to do so, and at the same time compel them to pay into the general fund a part of the costs of cleaning other streets, as provided for in the Act. Third. Because the proceeding which the Act attempts to authorize amounts to a taking of private property without due compensation and due process of law.

To support his contention as to the first proposition presented, the appellant relies to some extent upon the case of *Gridley v. City of Bloomington*, 88 Ill. 554, and the case of *City of Chicago v. O'Brien*, 111 Ill. 532. These cases hold that an ordinance making it the duty of the owner or person occupying premises abutting upon a street to keep the sidewalks free from snow and ice, and providing for the enforcement of such ordinance by the infliction of penalties, is void. The cases seem to rest principally upon the peculiarity of the laws of the State of Illinois, under which the lot-owner does not own the fee in the street. The last case, however, was decided by a divided court, three of the judges refusing to concur in the conclusion reached. The authorities make a clear distinction between the word "taxation" and the word "assessment." "Taxes are impositions for purposes of general revenue. 'Assessments' are special and local impositions upon property in the immediate vicinity of an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from the expenditure." *Palmer v. Stumph*, 29 Ind. 329. This distinction is recognized in nearly all the States of the Union. For a collection of the authorities upon this subject see the case above cited. The assessment, therefore, made against the owners of property along the streets required to be swept under the Act in question, to pay the expense of such sweeping, is not a tax, but a local assessment.

The question is then presented as to whether a local assessment for this purpose can be sustained under our Constitution. If it can be sustained at all, it must be upon the grounds that it is the proper exercise of the police power of the State, and a special benefit to the abutting property owner. The power of a municipal corporation to order sidewalks of a particular kind, and to assess against the abutting property owner an amount necessary to pay for the same, and to pay for keeping the same in repair and proper condition for the use of the public, is generally upheld upon the ground that it is proper exercise of the police power of the State. *Goddard*, Petitioner, 16 Pick. 504; *Palmer v. Way*, 6 Colo. 106; *Cooley*, Tax'n, pp. 396, 397; *State v. Mayor*, 37 N. J. Law, 423; *Kirby v. Boylston*, 14 Gray, 252; *Pedrick v. Bailey*, 12 Gray, 163; *Moore v. Gadsden*, 93 N. Y. 12; *Hartford v. Talcott*, 48 Conn. 525. Judge Cooley says: "The cases for assessments for the

portion of the public burdens in paying into the general fund for sweeping other parts of the city. Act is valid.

construction of walks by the side of streets in cities and other populous places are more distinctly referable to the police power. These foot-walks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots, at their own expense, within a time limited by the order for the purpose; and that, in case of their failure so to construct them, it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is done, the duty must be looked upon as a regulation of police, made because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for the performing with promptness and convenience the duty of putting them in a proper state, and afterwards keeping them in a condition suitable for use." Cooley, Tax'n, *supra*.

Assuming, as held by these authorities, that the power to make local assessments to pay for local improvements or benefits is to be referred to the police power of the State, we are naturally led to inquire whether the assessments provided for in the charter now under consideration amounts to a taking of private property without compensation, and without due process of law, as contended by the appellant. Mr. Sedgwick, in his valuable work on Statutory and Constitutional Law, 435, says: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given." . . . [Here follows a citation from 1 Dillon, Munic. Corp. 212, and a statement of the cases of *Goddard*, *Petitioner*, and *Carthage v. Frederick*.]

The principles which rule the cases above cited cannot, in our opinion, be distinguished from the principles which rule the case at bar. Of course, it is not claimed that in the exercise of the police power such assessments could be made and collected from the abutting property owner unless he had a special interest and derived a special benefit therefrom, not enjoyed by the public in general; but if he has a special interest in the improvement of the street and sidewalk, and in keeping them free from snow and ice, so he has a special interest in keeping them free from accumulating filth. It is matter of common observation, of which we must take notice, that property located upon well-improved streets, kept clean, is more desirable than property on unimproved streets where mud and filth are permitted to accumulate and obstruct their use. It is safe to assert, we think, that keeping a street clean adds to the rental, if not to the permanent value, of property located

thereon; and for this reason, among others, the abutting property owner has a special interest in such cleaning, not enjoyed by the general community. For the reason that the public in general has an interest in keeping the streets free from filth, the city may, in exercising the police power conferred upon it by the State, order them swept; and for the further reason that the abutting property owner derives a benefit from such sweeping not enjoyed by the general public, he may be required by assessments to pay the expenses incident to such sweeping. It follows from what we have said that the assessments provided for by the Act under consideration do not amount to a taking of private property without compensation and without due process of law.

Assessments of the kind we are now considering are made upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they can be sustained. If the property owner is fully compensated for his outlay in the enhanced value of his property, we see no reason why he may not be taxed generally, also, with the balance of the public, for cleaning other streets in which the public alone have an interest, and which are not, and, indeed, cannot be, swept as the streets upon which his property abuts. We are not able to perceive how such a tax would be unjust or inequitable, inasmuch as he receives as much benefit therefrom, in contemplation of law, as any other member of the community. As he has been fully compensated for his outlay in sweeping the street upon which his property is situated, he should not be heard to complain of such payment when called upon to bear his portion of other public burdens. Nor do we think the fact that the statute contemplates the sweeping of the crossings renders it invalid. It cannot be said that the property owners do not receive a special benefit from keeping them clean. Sweeping the street in front of the property would be of little benefit if filth and rubbish were permitted to accumulate upon the crossings, so as to render them unfit for use. If the property does in fact receive a special benefit from sweeping the crossings, there is no reason why those who are thus benefited should not pay the expenses. Having carefully examined all the objections urged against the validity of so much of the statute as is here called in question, we have reached the conclusion that it is not unconstitutional, and that the court did not, therefore, err in overruling a demurrer to the complaint before us. *Judgment affirmed.*

ELLIOTT, C. J., took no part in the decision of this cause.

Mass. statute authorizing

inspectors of milk to

enter any place

where milk is

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COMMONWEALTH v. CARTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[132 Mass. 12.]

INDICTMENT for an assault, on September 28, 1880, upon Martin Griffin, an inspector of milk, while said Griffin was in the discharge of his duty as such inspector. . . .

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. D. Thomson, for the defendant.

C. H. Barrows, Assistant Attorney-General (*G. Marston*, Attorney-General, with him), for the Commonwealth.

FIELD, J. The only question argued in this case is the constitutionality of the St. of 1864, c. 122, § 2, so far as it authorizes inspectors of milk to "enter any place where milk is stored or kept for sale, and all carriages used in the conveyance of milk; and (whenever they have reason to believe any milk found therein is adulterated) they shall take specimens thereof and cause the same to be analyzed, or otherwise satisfactorily tested, the result of which they shall record and preserve as evidence."

It is contended that this provision is unconstitutional, because it authorizes the taking of property without consent or compensation; warrants unreasonable searches and seizures; compels one to furnish evidence against himself; and is not within the police power of the Commonwealth. An analysis of a specimen of milk offered for sale is an appropriate means of carrying into effect the various provisions of the statutes regulating the sale of milk in this Commonwealth. In the case at bar, the can of milk was taken from a carriage used in the conveyance of milk, and it is unnecessary to consider whether the words of the section "place where milk is stored or kept for sale" may or may not include a dwelling-house, and whether, if construed to include a dwelling-house, they do not purport to give a power which the legislature could not give, because the clause authorizing an entry into any place where milk is stored or kept for sale is separable from that which authorizes an entry into all carriages used in the conveyance of milk. Neither is the power granted in violation of the provision of art. 12 of the Declaration of Rights, that no subject shall be compelled to accuse, or furnish evidence against himself. If the seizure is such as is authorized by the Constitution and a law passed in pursuance thereof, the fact that the thing seized may be used in evidence in a criminal charge against the person from whose possession it is taken, does not render the seizure itself a violation of the Declaration of Rights. *Commonwealth v. Dana*, 2 Met. 329, 337. If the statute had required that all milk offered for sale should first be inspected, it would hardly be contended that the trifling injury to property occa-

Whether a seizure is made within the meaning of the Declaration of Rights is a question not to be governed by the Declaration of Rights, but by the law of the land.

state to pay for the milk taken named St. Albans. The taking was for the public purpose or benefit. It is of great importance to have good food. Proper to take for poor and is under inspection whether or not suspect milk is not from a can or milk or perhaps taken, a being a proper amount

sioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights, for the common benefit; and in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation. *Bancroft v. Cambridge*, 126 Mass. 438, 441. Instead of requiring all milk offered for sale to be first inspected, the legislature for obvious reasons has permitted licensed dealers to sell milk without inspection, has imposed penalties for selling adulterated milk, has defined what shall be deemed adulterated milk, and has provided that when the inspector of milk has reason to believe that any milk has been adulterated he may take specimens thereof in order that by analysis or otherwise he may determine whether the milk has been adulterated. Such a seizure of milk for the purposes of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision under the laws by a public officer of a trade which concerns the public health, and is within the police power of the Commonwealth. *Commonwealth v. Ducey*, 126 Mass. 269. *Jones v. Root*, 6 Gray, 435.

There is nothing in this case which requires us to determine the rights of the defendant, if the inspector had attempted to take a larger quantity of milk for analysis than was reasonably necessary for the performance of his duties. We have not found it necessary to consider whether the defendant, by voluntarily accepting a license to sell milk, has not assented to the conditions and regulations which the legislature has seen fit to impose upon the exercise of the trade licensed. See *Pitkin v. Springfield*, 112 Mass. 509; *Bertholf v. O'Reilly*, 74 N. Y. 509, 517.

Exceptions overruled.

PEOPLE v. EWER.

NEW YORK COURT OF APPEALS. 1894.

[36 *Northeastern Reporter*, 4.]

APPEAL from Supreme Court, General Term, first department. . . .

Charlotte Ewer was arrested upon a police magistrate's warrant, charged with a misdemeanor in violating section 292 of the Penal Code by exhibiting her child, Mildred Ewer, as a dancer at the Broadway Theatre in New York City. The examination before the magistrate sustained the charge, and showed that she was of the age of seven years, and went by the stage name of "La Regalancita;" that she was clad in the usual style of the ballet-dancer, in a low-necked, sleeveless, and short dress, and wore purple tights; that she danced upon the

A mother was arrested for exhibiting her child, a girl of seven years, as a dancer at a public theatre.

organized as a state it is of paramount importance. child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community.

stage to the music of an orchestra, elevating her legs, moving upon her toes, and posturing with her figure. Her mother, being held upon the charge, sued out writs of *habeas corpus* and *certiorari*, to which the magistrate made return of his proceedings, etc. The prisoner demurred to the return; alleging that there were no sufficient grounds for holding her, and that the statute under which she was arrested was unconstitutional. The provisions of the Code under which this arrest was made read that "a person who . . . exhibits . . . a female child apparently or actually under the age of fourteen years, . . . or who, having the care, etc., of such a child as parent, etc., . . . in any way consents to the employment or exhibition of such a child either as . . . a dancer . . . or in a theatrical exhibition . . . or in any . . . exhibition dangerous or injurious to the life, limb, health or morals of the child . . . is guilty of a misdemeanor." At the Special Term the writs were dismissed, and the prisoner was remanded. The order of that court was affirmed at the General Term, and the defendant has appealed to this court.

A. J. Dittenhoefer and David Gerber, for appellant. *De Lancey Nicoll*, Dist. Atty. (*Elbridge T. Gerry*, of counsel), for the people.

GRAY, J. The question we shall determine upon this appeal is whether the statute under which the appellant was arrested violates any just and personal rights secured to her by the Constitution of the State. If it is such an interference with the legal relation of parent and child as exceeds the limits within which the legislature, exercising the sovereign power of the State, may regulate and control that relation, then it is the duty of the courts to declare its unconstitutionality; but, if it is within a proper and legitimate exercise of legislative functions, the courts may not interfere. This question falls within those which are classified under the head of the police power of the State. The extent of the exercise of that power, with which the legislature is invested, and which it has so freely exerted in many directions, within constitutional limits, is a matter resting in discretion, to be guided by the wisdom of the people's representatives. It is difficult, if not impossible, to define the police power of a State, or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the State, in the interest, and for the welfare, of its citizens. We may say of it that when its operation is in the direction of so regulating a use of private property, or of so restraining personal action, as manifestly to secure or to tend to the comfort, prosperity or protection of the community, no constitutional guarantee is violated, and the legislative authority is not transcended. But the legislation must have some relation to these ends; for, to quote the expressions of Mr. Justice Field in the *Slaughter-House Cases*, 16 Wall. 36, "under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded." In *People v. King*, 110 N. Y. 418, 18 N. E. 245, it was well observed by Judge Andrews: "By means of this power the legislature exercises a supervision over matters affecting the

What is the limit of this power? Could private theatricals be prevented? If the mischief were common and very great, probably such legislation would be proper. The case

of cruelty to children are perfectly proper. There must
be a prohibition in the court. in order to make such
legislation bad. We elect the legislature and

common weal. . . . It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise, within constitutional limits, is purely a matter of legislative discretion, with which courts cannot interfere." The assumption of the exercise of this extraordinary and very necessary power has been the subject of severe criticism in the opinions of judges, when it has been sought thereby to regulate and control in the interest of the public the conduct of corporate or individual business transactions. *Munn v. State of Illinois*, 94 U. S. 113, may be referred to as starting a current of authority in this country. But no such criticism can find just grounds for cavilling at legislation whose ends clearly tend to promote the health or moral well-being of the members of society. To that class of legislation this statute belongs. By preventing the exhibition of children of tender and immature age upon the theatrical or other public stage, the legislature is exercising that right of supervision and control over the child which in every civilized State inheres in the government, and which nothing in the legal relations of parent and child should be deemed to forbid. The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and, as its natural guardian, is held to the performance of certain duties. To society, organized as a State, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that, the better organized and trained the race, the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment, and which limit and regulate the employment of children in the factory and the workshop, to prevent injury from excessive labor. It is not, and cannot be, disputed that the interest which the State has in the physical, moral, and intellectual well-being of its members warrants the implication and the exercise of every just power which will result in preparing the child, in future life, to support itself, to serve the State, and, in all the relations and duties of adult life, to perform well and capably its part. . . .

The learned counsel for the appellant does not, in the main, contest the right and the duty of the State to protect, and to promote by adequate legislation, the health and morals of its citizens, but bases his arguments here upon the proposition, substantially, that the legislature cannot take from parents the right to employ their children in any lawful occupation, not indecent or immoral, or dangerous to life, limb, health, or morals. That proposition may be readily conceded. It is true enough that if the court could say that this legislation was an arbitrary exercise of the legislative power, depriving the parent of a right to a legitimate use of his child's services, — that, while ostensibly

for the promotion of the well-being of children, in reality it strikes at an inalienable right or at the personal liberty of the citizen, and but remotely concerned the interests of the community, — it would be its duty to so pronounce, and to declare its invalidity. But this legislation has no such destructive effect or tendency. It does not deprive the parent of the child's custody, nor does it abridge any just rights. (It interferes to prevent the public exhibition of children, under a certain age, in spectacles or performances which, by reason of the place or hour, of the nature of the acts demanded of the child performer, and of the surroundings and circumstances of the exhibition, are deemed by the legislature prejudicial to the physical, mental, or moral well-being of the child, and hence to the interests of the State itself.) Take the facts of this case, and they seem sufficiently to warrant the interference of the law. It is not necessary to reason upon them. The scanty dress of the ballet-dancer, the pirouetting and the various other described movements with the limbs, and the vocal efforts cannot be said to be without possible prejudice to the physical condition of the child, while in the glare of the footlights, the tinsel surroundings, and the incense of popular applause, it is not impossible that the immature mind should contract such unreal views of existence as to unfit it for the stern realities and exactions of later life. The statute is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb, by what is required of the child actor. Its application is to all public exhibitions or shows. That any and all such shall be deemed prejudicial to the interests of the child, and contrary to the policy of the State to permit, was for the legislature to consider and say.

The right to personal liberty is not infringed upon because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less exceptionally endowed. The inalienable right of the child or adult to pursue a trade is indisputable; but it must be not only one which is lawful, but which, as to the child of immature years, the State or sovereign, as *parens patrie*, recognizes as proper and safe. It is not the strict moralist's view, dictated by prejudice, but the view from the standpoint of a member of the body politic, which ranges the judgment in support of legislative interference to restrain the parent from permitting an employment of the child under circumstances deemed unsuited to its proper mental, moral, or physical development. In the judgment of the legislature it was deemed as unsuitable for the youth of the community, under a certain age, to dance or to perform in public exhibitions in the ways mentioned as it was deemed unsuitable for them to work in the factory, except under certain limitations as to age, hours, etc.

We have not overlooked certain cases referred to by the appellant's counsel to show the invalidity of this legislation as an exercise of the police power of the State, or to show a violation of constitutional rights. They establish that the legislature has no right, under the

guise of protecting health or morals, to enact laws which, bearing but remotely, if at all, upon these matters of public concern, deprive the citizen of the right to pursue a lawful occupation. Such were *In re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285. We are referred to some cases in Illinois, but they are neither applicable nor authoritative upon the question before us.

Further discussion is unnecessary. We might have remained satisfied with the able and clear exposition of his views by the learned justice at the special term had not the range taken by the arguments of counsel seemed to call for a brief expression by us of our view of the principle of State interference. The order should be affirmed. All concur. *Order affirmed.*

valuable case
for criminal statutes
evidence

PEOPLE v. CANNON.

NEW YORK COURT OF APPEALS. 1893.

[139 N. Y. 32.]

a statute of N.Y. made it unlawful for any one other than the registered owner of stamped bottles or kegs to fill them with the contents from which they were intended or to sell or otherwise dispose of them without the written consent of the party so making or naming them; and declared the mere possession of such written consent by a junk or 2nd hand dealer to be presumptive evidence of such unlawful use. Defts. were indicted for having such

APPEALS from judgments of the General Term of the Supreme Court in the first judicial department, entered upon orders which affirmed judgments convicting the defendants of violation of the "Bottling Act" (Chap. 377, Laws of 1887, as amended by chap. 181, Laws of 1888), entered upon verdicts of the Court of General Sessions of the Peace of the city and county of New York.

Each defendant was convicted upon a separate indictment and trial of a violation of what is described in the various records as the "Bottling Act," and known as chapter 377 of the Laws of 1887, as amended by chapter 181 of the Laws of 1888.

The first three sections of the Act are here alone material. The title of the Act and the sections spoken of read as follows:

"An Act to protect the owners of bottles, boxes, siphons and kegs used in the sale of soda waters, mineral and aerated waters, porter, ale, cider, ginger ale, milk, cream, small beer, lager beer, weiss beer, beer, white beer or other beverages."¹ . . .

¹ Section 1 enables dealers in soda water and many other things, who furnish the goods in stamped bottles, kegs, etc., to register the name or device so stamped. Section 2 makes criminal the filling of such registered bottles, etc., with the substance for which it is intended, or the selling, giving, or otherwise disposing of them without the written consent of, or unless purchased from, the party so making them. Section 3 makes such forbidden use of the vessels, etc., by any other party than the one whose device they bear, for the sale of certain specified contents, or the buying, selling, using or trafficking in such vessels, without such written consent, or the having them, by any junk dealer, or second-hand dealer, in his possession, without such written consent, — presumptive evidence of said unlawful use, etc. — Ed.

not take away or impair the right of trial by jury nor really
change the burden of proof. The state must still sustain the
burden of proving PEOPLE v. CANNON. The guilt [CHAP. V. beyond

There were three counts in each indictment, one for unlawfully buying from a person to the grand jury unknown, one for unlawfully taking from a person to the grand jury unknown, and one for unlawfully trafficking in and disposing of in a manner and by means to the grand jury unknown certain bottles (describing them as having marks on them, etc., as provided for in the first section of the above Act). The defendants are dealers in, among other articles, second-hand bottles of all descriptions. They are among the largest dealers in those articles in the city of New York, have been engaged in that business for a number of years, and their stock on hand at the time when the occurrences herein spoken of took place, reached in each case to the number of several hundred thousand bottles. Neither of the defendants was able to tell of whom or where he purchased the bottles which are the subject of complaint in his case. They purchase all kind of bottles from whoever comes with them, if satisfied they have not been stolen. Their purchases come from all over the country by rail and in vessels, and packed in boxes and barrels, and they are ignorant of the kinds of bottles that thus come until they have been taken from the various railroad stations or vessels and brought to their stores and sorted out. The defendants claimed to be ignorant of the possession of any of the classes of bottles described in the indictments until their places were visited by the police under a search-warrant sworn out by a detective employed by an association of manufacturers of soda waters, beer, etc., and who were the owners of bottles registered as provided for by the law.

Among all the bottles that were in the possession of the defendants, there are involved in this proceeding but very few, as the evidence shows there were only found an insignificant quantity of registered bottles as compared with the immense numbers of others which were on hand and dealt in by the defendants.

Everett P. Wheeler, for appellants.

Wm. J. Gaynor, for Bartholf, appellant.

Wm. Travers Jerome, for respondents.

PECKHAM, J. These prosecutions have been instituted for the purpose of obtaining a decision in regard to the validity of the law under which the convictions have been secured. Counsel for both parties have so stated, and the courts below have distinctly ruled upon the various propositions raised, so that the constitutionality of the statute might be fairly tested.

It is claimed that the Act deprives all persons other than the manufacturers of the right to traffic in or give away sparkling or aerated liquors or beer which have ever been placed in a trade-mark bottle. It is said that if the manufacturer refuses to sell the bottle, he in effect prohibits the sale or gift of that which is contained in it, except over the counter, and it is urged that the legislature cannot grant to the manufacturer such a monopoly.

It is needless to speculate as to the powers of the legislature upon the bottles and preventing others from using bottles in a certain way. Sup. a man buys a bottle and he could dispose of the bottle or use it to his satisfaction or take it to the legislature.

of his own property if it is not for the
statute title had not passed.

As to the evidence

this subject, because we are of the opinion the statute is not susceptible of any such construction.

It is made unlawful for any one to fill up with soda waters, etc., any bottle marked and distinguished as in the first section of the Act is provided, or to deface, erase or obliterate any such mark on such bottle, or to sell, etc., or to otherwise dispose of, or traffic in the same, without the written consent of, or unless the same have been purchased from the person whose mark is on the bottle. This provision of the Act refers to the use of these empty bottles by some one other than the owner of the marks thereon, and after the original contents of such bottles have been taken out, and then unlawfully using or trafficking in the empty bottles.

After the retail dealer or any one else has purchased the soda water or beer from the manufacturer, and the same has been delivered to him packed in the bottles thus marked, he is not prevented by anything in the statute from himself selling such soda water or beer and delivering the same to the purchaser packed in the same bottles in which it was delivered to him from the manufacturers. This process may be continued indefinitely. The Act is not aimed at the sale and delivery of the water or beer packed in the original bottles as it came from the manufacturer, but it is aimed at an unlawful dealing in empty bottles that have been marked, and after their original contents have been used. If otherwise, it is clear that an enormous amount of the business of the manufacturers would be curtailed. It is a fact which every one knows, that large amounts of the liquors originally put up in these bottles are sold by the manufacturers to the retail dealers, who sell them to the customers, who take them away in the original bottles in which the manufacturers delivered them to the retail dealers, and it cannot be contended with any degree of plausibility, as it seems to us, that there is anything in the language of the statute, properly construed, which prohibits such a dealing in and delivery of the liquors by any one into whose possession and ownership they have lawfully come.

Nor is there any just foundation for the assertion that the Act necessarily destroys or unlawfully decreases the trade in empty bottles, which is a fair trade and one entitled to the equal protection of the law. The Act contains no provision in regard to empty bottles in general. It forbids the use or traffic in certain kinds of bottles without the written consent of the owners of the marks on them, or unless they have themselves once sold the bottles. It is not necessary that they should have sold to the person using them. A sale of the bottles to any one thereafter precludes the application of the provisions of the statute. A bottle that has been marked as described in the first section, and has thereafter been used by the owner of the marks for the purpose of identifying in the market the particular goods manufactured by him and put up in such bottles, ought not to be used for other purposes against the will of the manufacturer, so long as he has not sold

be something which has some natural relation
in question in order to make it prima facie evidence
of crime. See page 849

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the bottles to any one, nor authorized any one to use or traffic in them; in other language, so long as he continues the owner of the bottles.

And this kind of use or traffic the law is intended to prevent.

Under the broadest definition of the term liberty, as used in the Constitution, it is not probable that any one would contend that it covers, or ought to cover, the liberty of dealing in property which the original owner has not sold to any one or authorized any one else to deal in. And yet the claim that the Act destroys the trade in second-hand bottles would lead to this result if it were allowed. Because the Act prohibits the dealing in the property of a third person without his consent, it may be that the business of the second-hand bottle-dealer is affected so far as to necessitate further precautions in regard to making purchases, than would otherwise be necessary. Before purchasing second-hand bottles he must be assured that the person selling has the right to sell them, and that he, the dealer, has the right to buy them. This may require more of an inspection of the kinds of bottles purchased than the dealer has heretofore been accustomed to give, but there is nothing improper in such obligation, and if he fail to perform it he must omit it at his peril. The Act in question has a tendency to prevent frauds upon the public in the way of filling these bottles with articles of the same nature as originally put in them, but not manufactured by the owners of the marks. Even though there may already be a section or sections of the Penal Code which cover such a subject, that does not render the further enactment of the legislature upon the same subject void. If naturally there may be trouble in showing that the person of whom the second-hand dealer purchased had himself obtained the bottles of some one who had purchased them from the manufacturers, or who had their written consent to deal in, use or traffic in them, such fact is only an additional reason for not purchasing such bottles until it is clear that they may be lawfully purchased. The Act does, undoubtedly, in this respect seriously hamper any one dealing in these kinds of empty bottles. I can, however, see no constitutional objection to the enactment based on that ground. A mere possessor of one of these empty bottles may wish to fill it without using the trade-mark. It is true he is prohibited from effacing the trade-mark, or erasing it, and this, it is said, destroys all property in the bottle, because the person who possesses it can make no earthly use of it. But in the case to which the Act is applicable, the person who has the bottle in his possession has no property right in it, and never did have. The consequence may be that he has no right to use the bottle himself, and that he does not stand in a position with regard to the person from whom he procured the bottle and contents, to require such person to take it back and give him its value, or an agreed sum, after the contents have been used. This may be his misfortune, but it does not create any right. As he never owned the bottle, or had any property right in it of that nature, that fact does not and cannot affect him.

I fail to find any constitutional defect in this statute so far as its general features under review in these cases are concerned.

There is a ground of invalidity now to be noticed that has been urged in regard to that portion of the Act which relates to matters of evidence. That portion of section three of the Act which provides that the having by any junk dealer or dealers in second-hand articles, possession of these kinds of marked bottles, or kegs, without the written consent of the owner of such marks, shall be presumptive evidence of the unlawful use, purchase and traffic in such bottles, is asserted to be unconstitutional as an invasion by the legislature of the domain of the judicial branch of the government.

It is said the legislature can create and define a crime, but it cannot declare what shall be *prima facie* evidence of its commission. Whether the crime as defined by the legislature has been committed by an accused is a question for the court and jury, and it is claimed that no direction to the court or jury as to what shall be considered *prima facie* proof can be given by the legislature. It may be remarked at the outset that this question does not arise in the case of Cannon. The defendant in that case agreed upon a state of facts upon which the judgment of the court and jury was requested, and in the statement it was agreed that the corporation which owned the marks and bottles in question had never granted any written or oral consent that the bottles should be used or trafficked in and had never sold or given away any such bottle.

In the other two cases the question is fairly up, and must be decided.

The legislature of this State possesses the whole legislative power of the people, except so far as such power may be limited by our Constitution. *Bank of Chenango v. Brown*, 26 N. Y. 467. The power to enact such a provision as that under discussion is founded upon the jurisdiction of the legislature over rules of evidence, both in civil and criminal cases. This court has lately had the question before it. *Board of Excise Commrs. v. Merchant*, 103 N. Y. 143. The Act in that case provided that whenever any person was seen to drink in a shop, etc., spirituous liquors which were forbidden to be drank therein, it should be *prima facie* evidence that such liquors were sold by the occupant of the premises or his agent with the intent that the same should be drank therein. The defendant was an occupant of premises where liquor could not be legally sold to be drank there, and he was prosecuted for selling the same in violation of the Act. The only evidence of a sale by the accused occupant was the fact that a person was seen to drink liquor upon the premises, and a conviction was asked for under the provisions of the Act quoted. The defendant was convicted, and his counsel urged that the Act was unconstitutional on the ground that it violated the constitutional guarantees of due process of law and trial by jury. It was held the claim was unfounded and that the general power of the legislature to prescribe rules of evidence and methods

of proof was undoubted, and had not been illegally exercised in that case. It is true it was a case for the recovery of a penalty and was brought by the commissioners of excise, and a civil judgment for damages was recovered. It was, however, treated as a *quasi* criminal case and criminal prosecutions were cited in support of the principle decided in it.

It cannot be disputed that the courts of this and other States are committed to the general principle that even in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y. 143, *supra*.) The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defence, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were uncontradicted. The case of *Commonwealth v. Williams*, 6 Gray, 1, supports this view.

Without the aid of the statute, the presumption provided for therein might not arise from the facts proved, although the statute says they shall be sufficient to authorize such presumption. The legislature has the power to make these facts sufficient to authorize the presumption (*State v. Mellor*, 13 R. I. at 669), and the jury has the power, in the absence of all other evidence, to base its verdict thereon, if satisfied that the defendant is guilty. (But the jury must in all cases be satisfied of guilt beyond a reasonable doubt, and the enactment in regard to the presumption merely permits, but cannot in effect direct the jury to convict under any circumstances.) The dissenting opinion of Mr. Justice Thomas, delivered in *Commonwealth v. Williams*, 6 Gray, *supra*, contains all that can be said against the validity of this kind of legislation.

It is argued, however, that assuming the validity of the provision in cases of excise sales and kindred cases, such as having in possession

game out of season (*Phelps v. Racey*, 60 N. Y. 10), and in civil cases, such as providing that the comptroller's deed upon a sale of land for taxes affords a presumption of the regularity of all prior proceedings (*Howard v. Moot*, 64 N. Y. 262; *Colman v. Shattuck*, 62 Id. 348), yet the principle does not apply to a case like this. The reason alleged is that the fact which is to be regarded as *prima facie* evidence of guilt, *viz.*, the possession of the bottles by a dealer in second-hand bottles without the written consent of the owner, was not one sufficiently identified in ordinary circumstances with guilt to make it the foundation of such a presumption.

The case of *People v. Lyon*, 27 Hun, 180, was a prosecution under the same section of the statute as that in *Commissioners of Excise v. Merchant*, 103 N. Y., *supra*. One of the judges at the General Term in illustration of his meaning that the fact from which the inference of guilt may be drawn should have some kind of natural reference to, or bearing upon the main fact, said that if the legislature could provide for such a presumption, it could enact that the drinking of liquors a mile distant from such premises should be *prima facie* evidence of a sale on the premises with intent that the liquors should be drank there. Or it might enact that if a dead body were found in any house, it should be *prima facie* evidence that the occupier of the house had murdered the deceased. The learned judge thought the Act in question was entirely arbitrary and had no regard to the connection or want of connection between the fact from which the presumption was to flow and the guilt of the accused. Yet this particular enactment, thus condemned by the Supreme Court, was upheld by this court in *Commissioners v. Merchant*, *supra*, 103 N. Y. The cases cited by way of illustration by the learned judge in his opinion in the Supreme Court are, in our view, far beyond the mark and contain nothing in common with the enactment here under review. In the cases supposed there would be, as the learned judge said, no kind of connection between the fact proved and the main fact in controversy. Such an enactment would be purely arbitrary. In this case, however, we think such connection exists. Of course the fact from which the presumption is to be drawn may exist without the existence of the main fact. That is true in all cases. In other words, the two facts are not necessarily inseparable. But in this case the fact of the possession of these kinds of bottles by a dealer in second-hand articles without the written consent of the owner, while it may be innocent, yet the presumption of an unlawful use or traffic in them is not so forced or so extraordinary as to be regarded by sensible and unprejudiced men as unreasonable or unnatural. It is some evidence of the main fact and the strength of it is properly a matter for legislative enactment in the first instance, subject to its submission to the jury for its deliberation and determination. So the presumption from the possession of certain birds out of season, that they were unlawfully killed or taken in the State, is not a certain presumption in any sense. A person might of course have the birds and have procured them in another State, and, therefore, not be guilty of a violation of

the game law. Yet the presumption of a violation of the statute is not such a forced and unnatural one that the legislature may not enact that it shall be made and thus leave the defendant to explain it. *Commonwealth v. Williams*, 6 Gray, *supra*, at page 6 in opinion of Shaw, Ch. J.

Nor can it be successfully maintained that this species of legislation is to be confined to those cases where the explanation of the fact from which the presumption is to arise is peculiarly within the knowledge of the party who is accused. There are many cases in the books (and they are cited in the cases already alluded to), where the principle is held that the burden of proving the existence of a fact peculiarly within the knowledge of the accused, is at common law placed upon him. *Potter v. Deyo*, 19 Wend. 361; *People v. Nyce*, 34 Hun, 298. If legislation were confined to such cases, it is plain that it would be entirely unnecessary and would accomplish nothing, as the law would place the burden of explanation upon the defendant without the aid of the statute. Within the limitations already alluded to and described, the statute may provide for the presumption and call upon the defendant to explain the fact. In prosecutions for the sale of liquor without a license the Supreme Court of Massachusetts held that under the old Act the prosecution must prove by proper evidence that the accused had no license, and no presumption that he had none could arise from the fact of selling. *Commonwealth v. Thurlow*, 24 Pick. 374. Thereupon the legislature passed an Act that in all prosecutions for selling liquors, the legal presumption should be that the defendant had not been licensed, thus reversing what had been held to be the common-law rule in *Commonwealth v. Thurlow*, *supra*. This was held to be within the power of the legislature. *Commonwealth v. Kelly*, 10 Cush. 69, 70; *Same v. Williams*, *supra*. It is true, the fact of having a license is one peculiarly within the knowledge of the party licensed. Yet the validity of legislation is recognized in these cases, although it enacts that a presumption shall be made from certain facts which at common law would not give rise to any such presumption. I do not know of any constitutional principle which, while permitting the legislature to enact that the legal presumption arising from the sale of liquor shall be that the person selling had no license, yet, at the same time, prevents the enactment of a provision like the one in the statute under discussion. If the legislature have the power in the first instance, I think it follows that it must have the power in the other. I can see no solid ground for distinction between the two cases. That it has the power in the first case is substantially conceded by all. The inference of guilt, under the provision in question here, is quite as strong as in many other cases that arise under statutory enactments, and we think it is sufficiently reasonable and natural to warrant a legislature in passing such an Act. The opinion of this court upon the question of the policy of this kind of legislation is not at all material, and will not, therefore, be stated.

The effect of the presumption is to call upon the accused for some explanation. If none be given, the jury may, as I have said, still

refuse to convict; but if they convict, the verdict may be upheld as founded upon sufficient evidence. The provision fills all the requirements of an Act of this nature, for it leaves an accused a fair opportunity to relieve himself from the presumption, to explain the circumstances under which the bottles came into his possession, and that they were of such a nature as to show him innocent of an unlawful use, purchase or traffic therein.

A dealer in second-hand bottles intending to obey the law would fairly be open to no danger of unjust conviction. While not giving personal supervision to the receipt of bottles coming by railroad or vessel, or brought to him for sale, he may direct his agents to receive none of the kind mentioned, and when they come from abroad he may so far conditionally receive them as to open their coverings and see what they are, and reject those which he cannot lawfully buy or deal in. Such a momentary or conditional possession, fairly explained and believed by the jury, or in regard to which they were doubtful, would rebut the statutory presumption and call for an acquittal. Proof that the bottles in question had been sold, or written authority to deal in them had been given by the owners to some one else, would also be a defence. It might be difficult of proof, it is said, and this may sometimes be true. If difficult of proof, the defendant should think of that before he purchases or deals in them, and decides to run the risk.

The Rhode Island Supreme Court has held an Act unconstitutional which in substance provided that the notorious character of the premises or the notoriously bad or intemperate character of the persons frequenting the same, or the keeping of implements or appurtenances usually appertaining to a grog shop where liquors are sold, should be *prima facie* evidence that the liquors were kept on the premises for the purpose of sale within the State. *State v. Beswick*, 13 R. I. 211; *State v. Kartz*, Id. 528. The same court, and in the same volume of its reports, held that a statute providing that evidence of the sale or keeping of intoxicating liquors for sale in any building should be *prima facie* evidence that the sale or keeping was illegal, and that the premises were nuisances, was constitutional. *State v. Higgins*, 13 R. I. 330; *State v. Mellor*, Id. 666.

In the *Kartz* case (*supra*) the court said that the introduction in the law of the principle that a person could be punished for what other people said about him was to render all constitutional provisions unavailing for his protection. The distinction is plain, I think, between the two classes of cases, and the statute under review here does not come within the principle which the Rhode Island court held to be a violation of constitutional rights.

We conclude that the provision in question cannot be assailed upon any constitutional ground. . . .

*Judgment affirmed in Cannon case and reversed in the others.*¹

¹ Compare *State v. Buck*, 25 S. W. Rep. 573 (Mo. 1894); *Holmes v. Hunt*, 122 Mass. 505, 516-521. — ED.

of the R. Co. "to put in cattle or stock guards upon their respective lines of road and keep the same in order" and for a failure to do so the companies were to be liable to the party injured by their neglect.

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BIRMINGHAM MIN. R. R. CO. v. PARSONS.

[CHAP. V.]

IN *Birmingham Min. R. R. Co. v. Parsons*, 13 So. Rep. 602 (Ala. July, 1893), the court (HARALSON, J.) said: "In *Zeigler v. Railroad Co.*, 58 Ala. 594, we had occasion to pass upon the validity of an Act which provided: 'That from and after the passage of this Act, all corporations, person or persons, owning or controlling any railroad in this State, shall be liable for all damages to live stock, or cattle of any kind, caused by locomotive or railroad cars.' It was there said of that statute, that it dispenses with all proof of the wrong it seeks to redress. 'It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employees, — an injury which no human prudence or foresight could prevent: and yet the statute will not allow the railroad to exculpate itself by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. . . . We can perceive of no reason, in law or morals, for holding them [railroad companies] to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which result from unavoidable accident, or accidents which no human prudence can foresee or avert.' This case, in these utterances, has been many times approved by us, and other courts. *Wilburn v. McCalley*, 63 Ala. 443; *Mead v. Larkin*, 66 Ala. 88; *Davis v. State*, 68 Ala. 63; *Green v. State*, 73 Ala. 32; *Railroad Co. v. Hembree*, 85 Ala. 485, 5 South. Rep. 173. Under the influence of these decisions, we are constrained to hold that the second section of said Act, in that it imposes an absolute liability on railroad companies, irrespective of compliance on their part with the duties prescribed in its first section, and without any fault on their part, is in violation of constitutional right. The first section, however, without reference to the second, and independently of it, prescribes the duty on these companies 'to put in cattle or stock guards upon their respective lines of roads, and keep the same in order,' and for a failure to do so they are liable to the party injured by their neglect. To prescribe the duties imposed by this section, we have seen, is a valid exercise of the power of the State. It may be maintained as such, separate from the second section. 3 Brick. Dig. p. 128, § 28; *Ex parte Cowert*, 92 Ala. 97, 9 South. Rep. 225. And 'every person, while violating an express statute, is a wrongdoer, and as such is, *ex necessitate*, negligent in the eye of the law, and every innocent party injured thereby is entitled to a civil remedy therefor;' and when a duty is required, and no remedy provided for its breach, the remedy is by common-law procedure. *Grey v. Trade Co.*, 55 Ala. 403; *Lowmides Co. v. Hunter*, 49 Ala. 507; *Autauga Co. v. Davis*, 32 Ala. 703." ¹

¹ But see *McCandless v. Richmond, &c. R. Co.*, 16 S. E. Rep. 429 (So. Ca. Dec., 1892). — Ed.

a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries resulting from unavoidable accident. The R. R. companies were not allowed to exculpate themselves by proof of the highest qualifications and most watchful vigilance.

17 Sep
R. 2

Can not a legislature say that a corp. doing a certain business shall carry it out in a special.

STATE v. DIVINE.

SUPREME COURT OF NORTH CAROLINA. 1887.

[98 N. C. 778.]

THIS was a criminal action, tried before CLARK, JUDGE, at January Term, 1887, of Robeson Superior Court.

The prosecution of the defendant, commenced by warrant, issued by a justice of the peace of Columbus County, and tried by him, charges the defendant, as superintendent of the Wilmington, Columbia, and Augusta Railroad Company, with a personal criminal responsibility, for the running over and killing two cows, the property of J. C. Powell, the prosecutor, by a train moving over its track, on May 19th, 1886. The proceeding is instituted under the Act of 1880, ch. 13, which is brought forward, and constitutes the four last sections, 2327, 2328, 2329, 2330, of chapter 10 of vol. II. of *The Code*. [These sections are placed in a note.¹]

¹ The enactment is in these words:—

"When any cattle, horses, mules, sheep or other live stock shall be killed or injured by any car or engine running on any railroad in the counties of Columbus, New Hanover, Brunswick, Bladen, Robeson, Richmond, Anson, Union, Gaston, Lincoln, Cleveland, and Burke, it shall be a misdemeanor; and the president, receiver, and superintendent of such road, and also the engineer and conductor in charge of the train or engine by which such killing or injury is done, may be indicted for such killing or injury: Provided, if the parties indictable under this section shall, within six months after the killing as aforesaid of any stock mentioned in this section, and before any indictment is preferred or warrant issued, pay the owner of such stock as may be killed his charges for said stock, or in the event the charges are too high, or thought to be so, such sum or sums as may be assessed by three commissioners,—one to be chosen by the party whose stock is killed or injured, a second by the party accused of killing the same, and the third by the two commissioners chosen as above indicated, who shall meet at some place in the county where the stock is killed or injured, to be selected by the parties interested,—within thirty days after they are chosen and accepted, such payment shall be a bar to any prosecution under this section; and the decision of two of said commissioners shall be final for the purposes of this section: Provided further, if any person or persons liable to indictment under this section, shall within the time prescribed, propose to the party endamaged to refer the matter of damages in the manner hereinbefore indicated to three commissioners, and the party endamaged shall refuse or decline such proposition, such refusing or declining shall be a bar to any prosecution under this section: Provided also, if the party endamaged shall, at any time before the indictment is preferred, or warrant issued, directly or indirectly, receive any sum in full compensation of his damages, such compensation shall be a bar to any prosecution under this section; and if any compensation be so received after indictment is preferred or warrant issued, or if after said time the party accused shall pay or tender to the owner of the stock killed the value of the same, as decided by the commissioners, as above provided,—in either case the prosecution shall go no further, and the accused shall be charged only with accrued cost."

The second section prescribes the punishment by "fine not exceeding fifty dollars, or imprisonment not longer than thirty days."

The third provides that, "when stock is killed or injured by a running engine or

was made prima facie evidence of negligence. The superintendent of the road having refused to submit to the commission the assessment of damages for the killing of two cows, it was indicated.

A statute applying only to certain counties in this State, made the Pres. Rec. and superintendent together with the engineer and conductor of a train subject to indictment for the killing of any live stock by a train. But if a person is prosecuted in any way of damages, the owner of the stock to be determined in case of disagreement by commissioners to be selected by the parties, the prosecution should be barred. The mere killing of stock in counties enumerated

Upon an appeal to the Superior Court from the judgment rendered against the defendant by the justice of the peace, a special verdict was found by the jury in these words: "The cattle were killed by the cars of the Wilmington, Columbia, and Augusta Railroad Company as alleged, under the following circumstances, to wit: That at the time of the killing it was a bright moonlight night, about 10 p. m.; that the train was on schedule time, running at the rate of forty miles per hour; that the cattle could have been seen at least one hundred yards ahead of the train; that the cattle were not seen by the engineer until struck by the train; that the cattle were the property of J. C. Powell; that the corporation owning the road is the same which was chartered by the Act of March 1st, 1870, as the Wilmington and Carolina Railroad Company; that the defendant is the superintendent of the said Wilmington, Columbia, and Augusta Railroad Company; that the said company refused to refer the matter to arbitration; that the defendant, J. F. Devine, was not on the train that did the killing, and was in no way connected with said killing."

The court being of opinion that the defendant was not guilty, adjudged that he go without day, and the Solicitor appealed.

The Attorney-General, for the State. *Mr. Geo. Davis* (by brief), for the defendant. . . .

SMITH, C. J. . . . The objections to the validity of the legislation are pointed out and forcibly presented in the brief of defendant's counsel, with an array of numerous rulings in their support, as follows:—

1. In its whole structure and manifest purpose it creates out of a private civil injury a public prosecution, to subserve the interests of the injured party, and to be put in operation or arrested at his instance and election. 2. It assumes a criminal liability to have been incurred by an officer of a railroad corporation, without his concurrence in the act of the subordinate, and, assuming negligence and guilt, puts him on the defensive, and requires him to repel the presumption, when he in no manner participated in what was done. 3. It undertakes to drive the accused to an adjustment of the claim for damages by assenting to a reference to arbitration, and to deprive him of his constitutional right to be tried in the courts of the State—tribunals provided under the Constitution—and by a properly constituted jury, acting under a judge. 4. It places at the election of the claimant the institution of the prosecution, which otherwise is suspended, by making a proposition for a reference. 5. It discriminates, without apparent difference, between counties and railroads, giving partial operation to a law, general in its provisions and equally applicable to all, by which the same act is rendered criminal in one locality which is not so in another, and raising

car in the counties enumerated, it shall be *prima facie* evidence of negligence on the trial of the indictment."

The fourth section declares that the indictment against the officers of railroad companies shall not lie "until a proposition to refer the matter has been proposed by the party claiming that he has been damaged."

very objectionable but might be sustained

out of an act done by one employee a presumption of guilt against another employee, who did not, in any way, participate in it.

We do not perceive any difficulty in the Act of 1856-57 (*The Code*, § 2326) raising a presumption of negligence on the part of the company from the fact of killing or injuring stock, in a civil suit for reparation, brought within six months thereafter, as is explained in the opinion in *Doggett v. Railroad*, 81 N. C. 459, and whose validity has not been questioned in the numerous cases which have been before the court. But the present case passes far beyond the limits of that enactment, in fastening a criminal responsibility, not upon the principal whose agent does the injury, but upon a co-employee in the same general service, and this not upon all, but specially upon railroads that run through or in particular counties.

We do not say that there may not be local legislation, for it is very common in our statute-books, but that an act divested of any peculiar circumstances, and per se made indictable, should be so throughout the State, as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation.

Looking at the indictment, it will be seen that the only material allegations are, that the prosecutor's cattle were killed by a moving train on the road of the company of which the defendant is superintendent, without connecting him with the act; and scarcely more definite is the special verdict.

Do these words impute crime, and upon mere proof of these facts is the charge established, and must the defendant be convicted unless he repels the negligence which the statute presumes in the subordinate employed in managing the train? The very question involves an answer, unless all the safeguards thrown around one accused of crime are disregarded, and he left without their protection. The defendant was not on the train when the accident occurred, and has no personal relation to it, except such as results from his position as a higher officer of the road, — making the offence one by construction. Judge Cooley, in his work on Constitutional Limitations, at page 309, referring to a trial for criminal offences of different grades, uses this impressive language: "The mode of investigating the facts, however, is the same in all, and this is through a trial by jury, surrounded by certain safeguards, which are a well-understood part of the system, and which the government cannot dispense with," meaning, as we understand, that the charge must go before the jury, and the guilt of the accused proved to them, with the presumption of innocence until this is done.

In *Cummings v. Missouri*, 4 Wall. 328, Mr. Justice Field, referring to certain enactments in that State, says: "The clauses in question subvert the presumption of innocence, and alter the rules of evidence which, heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable." "But I have no hesitation in saying," remarks Selden, J., in *Wynehamer v. The People*, 13 N. Y. 446, "That they (the legislature)

cannot subvert that fundamental rule of justice which holds that every one shall be presumed innocent until he is proved guilty."

The case is not analogous to that wherein for civil purposes negligence is inferred from the fact of killing stock, and requiring matters in excuse to be shown, which lie peculiarly within the knowledge of the agent who perpetrated the act, or controls the running of the engine when it is done; nor to the statute (*The Code*, § 1005) which makes the having about the person one of the deadly weapons forbidden to be carried, or worn, *prima facie* evidence of concealment; for this is the sole personal act of the party, of the consequences of which he is aware, and because a small weapon, if concealed, would be almost impossible of proof direct, while the possession of such is intimately and naturally connected with the secret carrying, and furnishes strong evidence of the fact.

In *Sun Manteo v. Railroad*, 8 Am. & Eng. R. R. Cases, 10, in construing the Fourteenth Amendment to the Constitution of the United States, it is said: "Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them, by every one on similar terms in his life, his liberty, his property, and in the pursuit of happiness."

Substantially the same doctrine is announced, and by the same eminent judge (Mr. Justice Field), in *Barbier v. Connolly*, 113 U. S. 31, in which he adds, "that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

From what has been said, it results that the legislation in question has not the sanction of the Constitution, and cannot be upheld as within the competency of the law-making power to enact.

We have gone into this inquiry in order to settle the question of the validity of the statute in the application to the case before us, and because it will practically put an end to the litigation. But for the defect in the special verdict we are compelled to direct that it be set aside for further proceedings in the court below.

Reversed and special verdict set aside.

Am. 4-26-64

OHIO AND MISSISSIPPI RAILWAY COMPANY v. LACKEY.

SUPREME COURT OF ILLINOIS. 1875.

[78 Ill. 55.]

APPEAL from the Circuit Court of Marion County; the HON. SILAS L. BRYAN, JUDGE, presiding. *Mr. H. P. Buxton*, for the appellant.

MR. JUSTICE BREESE delivered the opinion of the court:

This is an appeal from the judgment of the Marion Circuit Court,

rendered at the October term, 1870, upon the following agreed state of facts :

“ It was agreed in this case that, during the year 1869, three persons were run over and killed by trains on the railroad of appellant, in Marion County, and the appellee, being coroner of said county at the time, held an inquest in each case, the expenses of which, together with the costs of burial, amount, in the aggregate, to \$91.15 ; that if appellant was, in law, liable to appellee, upon the facts stated, for the above amount, then judgment should be rendered in favor of appellee therefor, and if not so liable, then judgment should be for appellant, with the right to either party to appeal.”

In 1855, the General Assembly of this State passed an Act entitled “ An Act to provide for the burial of the dead occurring on railroads, and in or by vehicles carrying passengers,” in the second section of which Act it is provided that “ every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise ; and any coroner, city, town, or person who shall take charge of and decently inter any such body or corpse, or cause an inquest to be held over such corpse, shall have cause of action against such company, before any court having competent jurisdiction.” Sess. Laws, 1855, p. 170 ; Scates’ Comp. 423.

It is insisted by appellant that this statute is not within the constitutional competency of the General Assembly to enact, as it places the burden of these expenses upon the railroad companies, which, in other cases of like nature, is placed upon the estate of the deceased, or upon the county in which the accident may occur. This is the general law. R. S. 1845, ch. 99, title, “ Sheriffs and Coroners,” sec. 23 ; R. S. 1874, sec. 21, title, “ Coroners.”

It may, very pertinently, be asked, Why this distinction ? On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred ?

An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party’s own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of

the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation.

This may be considered in the light of a special tax, for which there is no sanction in the Constitution. We have not been furnished with any brief, points, or argument for the appellee. The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment.

In 1874, the General Assembly repealed this statute, by chap. 131, title, "Statutes," R. S. 1022, but, at the same session, re-enacted it substantially, giving the power to sue, not to the coroner, as here, but to the county. *Ib.*, title, "Coroners," 283, sec. 22.

For the reasons given, the judgment is reversed.

Judgment reversed.

TOLEDO, ETC. RAILWAY COMPANY v. JACKSONVILLE.

SUPREME COURT OF ILLINOIS. 1873.

[67 Ill. 37.]

APPEAL from the Circuit Court of Morgan County; the HON. CHARLES D. HODGES, JUDGE, presiding.

This was a suit brought by the city of Jacksonville against the Toledo, Wabash, and Western Railroad Company, before a justice of the peace, to recover a penalty for a violation of the ordinance of the city referred to in the opinion of the court. The cause was taken to the Circuit Court by appeal, where a trial was had before court, without a jury. The court found the defendant guilty, and rendered judgment in favor of the plaintiff for \$50. The defendant appealed. *Mr. William H. Barnes*, for the appellant. *Mr. Edward Dunn*, for the appellee.

MR. JUSTICE SCOTT delivered the opinion of the court:

This action was brought to recover a penalty for a failure to comply with an ordinance of the city which required the railroad company to keep a flagman by day and a red lantern by night at the point where its track crosses the street or State road just west of the bridge known as "Rock Bridge."

It is stipulated that the company did not keep a flagman at the crossing indicated; that it is within the bounds of the city; that it is an important crossing, and much used; that it has been so used by the railroad and the inhabitants for the last twenty-five years, and that, by resolution of the city council, the company is not required, at this point,

to run its trains at a rate of speed not greater than eight miles per hour, as required by general ordinance.

The charter of the city contains the usual grants of power to pass such ordinances as may be deemed necessary for the good government of the city, to control streets and alleys, to declare what shall be deemed a nuisance and abate the same, and to control the laying of railroad tracks in the streets and alleys. It contains no express grant of power to pass the ordinance in question. The right to do so is claimed under the police power of the municipality.

Waiving the question of the power of the city to pass the ordinance without being expressly authorized by the General Assembly, we shall treat the case as though the city had the right, by the grants in its charter, to exercise all the power in the regulation of its domestic affairs that the State could do for the general welfare of the people.

There can be no question that railway corporations are subject to police regulations as well as private citizens. The General Assembly, when the public exigencies require it, has power to regulate corporations in their franchises so as to provide for the public safety. The exercise of this right in no manner interferes with or impairs the powers conferred by their Acts of Incorporation. *The G. and C. U. R. R. Co. v. Loomis*, 13 Ill. 518; *Thorpe v. Rutland and Burlington R. R.*, 27 Ver. 140.

Under this power, it has been held that the legislature may require railroad corporations, notwithstanding no such right has been reserved in the charters, to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do many other things for the protection of life and property. This power is inherent in the State, and it cannot part irrevocably with its control over that which is for the health, safety, and welfare of society.

But such regulations must be what they purport to be, police regulations, and must be reasonable when applied to corporations or individuals. What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise the right to enact such laws.

Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the General Assembly, under the pretence of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety, or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void.

It seems to us that the ordinance in this case imposes an unreasonable burden upon the railroad company. There is but a single track, so far as the record discloses, at the point where it requires the services of a

*Of. holds the regulations had because unreasonable
Such precautions at important crossings would be*

good.

flagman, and only the usual trains of the company pass over it. It is totally unlike a place where a number of tracks cross a public street upon which there is a great amount of travel, where trains are made up, and where the trains and locomotives doing the work pass and repass each other at short intervals. The frequency with which trains pass and repass at such places renders the dangers to be apprehended constantly imminent, and the legislature may so declare and make it obligatory on the company to adopt measures to secure the public safety. The rights of the company and the public to the use of the crossing are mutual, but it is the duty of the company to provide the proper safeguards, and the degree of diligence must be in proportion to the hazard. A regulation that would require the company to place a flagman at such a place, or at any place where danger to the public safety, in the judgment of prudent persons, might be apprehended at any time, would be a reasonable one, and could, unquestionably, be enforced. There can be no necessity, however, for the services of a flagman at a crossing of a public highway in the country, where there is but little travel. There, it will be a sufficient protection if the company shall be required to erect signs that will notify persons that they are approaching a railroad crossing, and to give the usual signals. It is then the duty of the citizen to exercise a reasonable precaution for the safety of himself and his property.

It would hardly be insisted a regulation that would compel a railway company to maintain a flagman at every crossing of a public road or street on its entire line would be demanded by the public exigencies, or be within the constitutional exercise of the police power of the State. It is a matter of which we may take judicial notice, there does not now exist a necessity to enforce in this State many of those rigid regulations that have been adopted on some of the English railways, and in some of the densely populated countries on the continent of Europe. Doubtless, as the population increases and the dangers multiply, it will become necessary, in this country, to increase precautionary measures for the public safety, and the companies will be compelled to bear the additional burden made necessary by the hazardous business in which they are engaged. It is their work that renders public crossings dangerous, and hence it is they may be compelled to bear the expenses of such measures as may be adopted to secure the lives and property of those who have an equal right with them to the use of the crossing on the highway.

There is nothing at the crossing where the company is required, by the provisions of the ordinance in the case at bar, to keep a flagman, that makes it unusually dangerous. So far as we know, it is an ordinary crossing. There is but a single track, on which only the usual trains pass at regular and irregular intervals and distance apart. The city has not even deemed it advisable to require the company to slacken the speed of its trains when passing this point, as it is compelled to do by ordinance when crossing other streets in the city. If the company can

be compelled to maintain a flagman at this point, there is no reason why it could not be compelled to keep one at every road and street crossing on its entire line. That there are places where the danger to be apprehended is so constant and imminent, by reason of the construction of the passage-way over the track, the company may be required to employ a flagman to warn persons of the danger and conduct them across, we entertain no doubt, but the point designated in this ordinance is not such a one, at least it does not appear to be so from the ordinance itself, or from anything in the record.

The conclusion that we have reached is, that the ordinance under which it was sought to compel the railroad company to maintain a flagman at the point designated is not a reasonable requirement, and is therefore within the constitutional limitations on the exercise of the police.

The judgment of the court below finding appellant guilty is contrary to law, and must be reversed.

Judgment reversed.

EX PARTE HODGES.

SUPREME COURT OF CALIFORNIA. 1890.

[87 Cal. 162.]

APPLICATION to the Supreme Court for a discharge on a writ of *habeas corpus*. The facts are stated in the opinion of the court.

Latimer & Brown, for petitioner. *W. S. Timming*, for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The Board of Supervisors of Contra Costa County enacted in the following ordinance. [It is found below in the note.¹]

The petitioner was convicted of a violation of this ordinance, sentenced to pay a fine, and in default of payment, was committed to the county jail. He now prosecutes this proceeding, and asks that he be discharged.

The question as to the constitutionality of the ordinance is gravely

¹ "An ordinance to provide for the extermination and destruction of ground-squirrels in the county of Contra Costa.

"The Board of Supervisors of the county of Contra Costa do ordain as follows:—

"Sec. 1. Ground-squirrels infesting lands in the county of Contra Costa are hereby declared to be a public nuisance.

"Sec. 2. All owners and occupants of lands within the county of Contra Costa are hereby required, within ninety days after the taking effect of this ordinance, to exterminate and destroy the ground-squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom.

"Sec. 3. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor.

"Sec. 4. This ordinance shall take effect and be in force on the thirtieth day of November, 1889."

and learnedly discussed by counsel on both sides, and Cooley's Constitutional Limitations, Potter's Dwaris on Construction of Statutes, Sedgwick on Constitutional Law, and other constitutional authorities, and decided cases innumerable, are cited in aid of and against its validity. It is certainly a most effective means of abating a nuisance, *viz.*, the squirrels, and bringing about a very desirable end. We regret exceedingly that we cannot see our way clear to uphold and enforce such an important and original piece of legislation. Indeed, it would give us great pleasure to see the power here assumed applied to snakes, tarantulas, ants, flies, fleas, and other reptiles, insects, and pests, which tend to make man's life a burden, and to have it exercised and enforced in every county in the State. But we are unable to see by what right or authority of law a board of supervisors can impose upon a land-owner the burden and expense of exterminating animals *feræ nature* on his own land, or elsewhere. It is true, the County Government Act, section 25, subdivision 28, gives boards of supervisors power to "provide for the destruction of gophers, squirrels, other wild animals, noxious weeds, and insects injurious to fruit-trees or vines, or vegetable or plant life," and this is a power that should be upheld in all cases, where the means employed are reasonable and not otherwise objectionable. But certainly this authority cannot be so far extended as to require a land-owner, under a penalty, to exterminate wild animals of which he is not the owner, and over which he cannot, in the nature of things, have any control or dominion. From our limited knowledge of the nature of the squirrel-tribe in this State, such a task would seem to us to be almost, if not quite, impossible.

The ordinance requires that all occupants of lands, within ninety days, exterminate and destroy the ground-squirrels on their respective lands, and thereafter keep said lands free and clear therefrom. This might be successfully done by the free and judicious use of poison, and perhaps by some other means, on very small tracts of land, but on large tracts it would certainly require eternal vigilance, if it could be accomplished at all, and if, after the extermination of the intruders on his own lands, one, only one, should come over from the land of his neighbor, the ordinance would be violated. The occupant of lands bordering on another county, where no such regulation prevailed, and the pesky squirrel was allowed to propagate and grow unmolested, would be in a most unfortunate condition. Such an ordinance differs materially from laws requiring an occupant of lands to keep them free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them, in order to prevent the spread of the disease. These are matters over which the property-owner has control, and the requirements are reasonable and just.

The respondent attempts to sustain the ordinance by and under section 11 of article XI. of the Constitution of this State, which provides that "any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations

as are not in conflict with the general laws." But the ordinance is not intended to preserve the peace and quiet of the county, or to prevent the use of one's property to the injury of another, or for the protection of the lives, limbs, or comfort of all persons, or to prevent the propagation or spread of disease, nor is it in any proper sense a police or sanitary regulation. What is meant by "other regulations," in the section cited, may be a question, but it must certainly be limited to objects similar to those denominated police and sanitary. If the Board of Supervisors had no authority to pass such an ordinance, then no offence was committed by the petitioner, the act or omission on his part was not a crime, the court had no jurisdiction to try or convict him, and he is entitled to his discharge.

We know of no law which can be held to authorize a board of supervisors to enact such an ordinance, and we are quite clear that it cannot be enforced, for the reason that it is unreasonable and burdensome in the extreme. Let the petitioner be discharged.

FOX, J., SHARPSTEIN, J., and THORNTON, J., concurred. PATERSON, J., and McFARLAND, J., concurred in the judgment.

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IN RE LEE SING ET AL.

CIRCUIT COURT OF THE UNITED STATES, N. D. CALIFORNIA. 1890.

[43 Fed. Rep. 359.]

AT LAW.

The ordinance under which the arrest was made is as follows.
[See the note.¹]

Thos. D. Riordan, for petitioners. *John I. Humphreys*, for the City.

SAWYER, J. The petitioners are under arrest for the violation of Or-

¹ "Order No. 2190 designating the location and the district in which Chinese shall reside and carry on business in this city and county.

"The people of the city and county of San Francisco do hereby ordain as follows :

"Section 1. It is hereby declared to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district of said city and county hereinafter prescribed for their location.

"Sec. 2. [This section defines the limits of the district appropriated to the residence of the Chinese.]

"Sec. 3. Within sixty days after the passage of this ordinance all Chinese now located, residing in or carrying on business within the limits of said city and county of San Francisco shall either remove without the limits of said city and county of San Francisco or remove and locate within the district of said city and county of San Francisco herein provided for their location.

"Sec. 4. Any Chinese, residing, locating, or carrying on business within the limits of the city and county of San Francisco contrary to the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term not exceeding six months.

"Sec. 5. It is hereby made the duty of the chief of police and of every member of

the U. S. Sup. Ct. whether a Chinaman born in this country is a citizen of the U. A.

der No. 2190, commonly called the "Bingham Ordinance," requiring all Chinese inhabitants to remove from the portion of the city heretofore occupied by them, outside the city and county, or to another designated part of the city and county. . . . [Then follows section 1 of the Fourteenth Amendment.]

Article 6 of the Burlingame Treaty with China, provides, that "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." 16 St. 740.

Section 1977 of the Revised Statutes of the United States provides as follows:—

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." . . . [Then follows Art. 6, cl. 2, of the Constitution of the United States.]

The discrimination against Chinese, and the gross inequality of the operation of this ordinance upon Chinese, as compared with others, in violation of the constitutional, treaty, and statutory provisions cited, are so manifest upon its face, that I am unable to comprehend how this discrimination and inequality of operation, and the consequent violation of the express provisions of the Constitution, treaties, and statutes of the United States, can fail to be apparent to the mind of every intelligent person, be he lawyer or layman.

The ordinance is not aimed at any particular vice, or any particular unwholesome or immoral occupation, or practice, but it declares it "to be unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in that district of said city and county hereinafter provided for their location."

It further provides that "within sixty days after the passage of this ordinance all Chinese now located, residing or carrying on business within the limits of said city and county of San Francisco, shall either remove without the limits of said city and county of San Francisco, or remove and locate within the district of the city and county of San Francisco, herein provided for their location." And again, section 4 provides that "any Chinese residing, locating, or carrying on business

the police department of said city and county of San Francisco to strictly enforce the provisions of this order.

"And the clerk is hereby directed to advertise this order as required by law.

"In Board of Supervisors, San Francisco, February 17, 1890.

"Passed for printing by the following vote: Ayes—Supervisors Bingham, Wright, Boyd, Pescia, Bush, Ellert, Wheelan, Becker, Pilster, Kingwell, Barry, Noble."

within the limits of the city and county, contrary to the provisions of this order, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for a term not exceeding six months. Upon what other people are these requirements, disabilities, and punishments imposed? Upon none.

The obvious purpose of this order, is, to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing, and otherwise, for more than forty years. Many of them were born there, in their own houses, and are citizens of the United States, entitled to all the rights and privileges under the Constitution and laws of the United States, that are lawfully enjoyed by any other citizen of the United States. They all, without distinction or exception, are to leave their homes and property, occupied for nearly half a century, and go, either out of the city and county, or to a section with prescribed limits, within the city and county, not owned by them, or by the city. This, besides being discriminating, against the Chinese, and unequal in its operation as between them and all others, is simply an arbitrary confiscation of their homes and property, a depriving them of it, without due process or any process of law. And what little there would be left after abandoning their homes, and various places of business would again be confiscated in compulsorily buying lands in the only place assigned to them, and which they do not own, upon such exorbitant terms as the present owners with the advantage given them would certainly impose. It must be that or nothing. There would be no room for freedom of action, in buying again. They would be compelled to take any lands, upon any terms, arbitrarily imposed, or get outside the city and county of San Francisco.

That this ordinance is a direct violation of not only the express provisions of the Constitution of the United States, in several particulars, but also of the express provisions of our several treaties with China, and of the statutes of the United States, is so obvious, that I shall not waste more time, or words in discussing the matter. To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds, which are so constituted, that the invalidity of this ordinance is not apparent upon inspection, and comparison with the provisions of the Constitution, treaties, and laws cited, discussion or argument would be useless. The authority to pass this order is not within any legitimate police power of the State. See *In re Tie Loy*, 11 Sawy. 472, 26 Fed. Rep. 611; *In re Ah Fong*, 3 Sawy. 144; *Chy Lung v. Frceman*, 92 U. S. 275; *In re Quong Woo*, 7 Sawy. 531, 13 Fed. Rep. 229; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; *Ho Ah Kow v. Numan*, 5 Sawy. 552.

Let the order be adjudged to be void, as being in direct conflict with the Constitution, treaties, and statutes, of the United States, and let the petitioners be discharged.¹

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MAYOR, ETC., OF BALTIMORE v. RADECKE.

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MARYLAND COURT OF APPEALS. 1878.

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APPEAL from the Circuit Court of Baltimore City. The case is stated in the opinion of the court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, and ALVEY, JJ. *Thomas W. Hall* and *James L. McLane*, for the appellant. *E. Duffy* and *S. Teackle Wallis*, for the appellee.

MILLER, J., delivered the opinion of the court. The appellee is tenant and occupant of certain premises situated on McClellan's Alley, in a central business locality in the city of Baltimore, where he and his father before him had carried on the business of carpentering and box-making since the year 1853. In 1866 he applied to the Mayor and City Council for permission, which was granted, to erect and use on these premises and in the carrying on of his business, a steam-engine. The resolution granting this permit contained a provision, in conformity to a city ordinance on the subject, that the engine was "to be removed after six months' notice to that effect from the Mayor." Upon the passage of this resolution he erected and has ever since used a steam-engine in his said business, but some time in the year 1873 the Mayor gave him notice to remove it, which he refused to do. The city, then, after the expiration of the six months instituted a suit before a justice of the peace, for the penalty of non-removal provided in the ordinance, and the appellee thereupon filed the bill in this case for an injunction to restrain the prosecution of that action and others which the city threatened to bring from day to day in order to enforce the removal of this engine. The court below on final hearing ordered the injunction to be issued as prayed and made it perpetual. From this order the Mayor and City Council have appealed.

The city legislation on the subject, in force at the time this permit was granted to the appellee, was first, the 56th section of Ordinance No. 33, approved June 5, 1858, by which it was provided under prescribed penalties that no person should "erect, build, or have put up any steam saw-mill or machinery, or any steam-engine for any purpose whatever, or planing machine, or machinery within the limits of the city, without first obtaining the sanction of the Mayor and City Council," and secondly, part of the 5th section of Ordinance No. 78, approved June 9, 1864, which provided that "all permits granted for steam-

train the prosecu-

¹ Compare *Ex parte Sing Lee*, 96 Cal. 354 (1892). — ED.

in of the suit. An appeal by the Mayor and council, held the engine was not in itself a nuisance. The ordinance did not profess to prescribe regulations for the construction or use of engines nor require

me in the city of Baltimore or all, from the use of steam in the prosecution of business and for any reason such officer should think fit. Such a law

boilers and steam engines and boilers may be revoked, and the same shall be removed, after six months' notice from the Mayor, and any one receiving such notice, who shall refuse or neglect to conform to the requirements of the same shall pay a fine not exceeding one hundred dollars, and a further fine not exceeding fifty dollars, for every day such refusal or neglect shall continue after the first." It is this last provision which the present case requires us more especially to consider, not only because the bill assails its legality and validity, but because the injunction complained of restrains the prosecution of suits for the penalties which it imposes for non-compliance with the notice and order to remove given by the Mayor. It is obvious that those who enacted this provision did not suppose it was an exercise of the power "to prevent and remove nuisance," for it would be a curious anomaly in municipal legislation on that subject, as well as a novel mode of removing a nuisance, to pass an ordinance allowing a nuisance to remain for six months after the Mayor had determined it to be such, before any steps could be taken to enforce its removal. But further than this, a stationary steam-engine is not in itself a nuisance even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets. There is no proof in this record of any such interference, or even that this was the ground of the Mayor's action in giving the notice. Nor was this engine used in connection with any trade or occupation which the law pronounces offensive or noxious. The business of carpentering and box-making is neither offensive to the senses nor deleterious to health. In fact, the only complaints made against the engine are its liability, in common with all other steam boilers, to explode, and that it is used in a business in which combustible materials are necessarily brought in dangerous proximity to the fire of its boiler, and it therefore subjects buildings and merchandise in that vicinity to increased danger from fire, raises the premiums of insurance thereon, and excites the fears of neighboring owners for the safety and security of their property, but neither one nor all of these circumstances combined, make it a nuisance. *Rhodes v. Dunbar*, 57 Penn. State Rep. 274.

But the legislature has granted ample power of legislation upon the subject of the erection and use of steam-engines within the city limits, to the Mayor and City Council of Baltimore, independent of the power "to prevent and remove nuisances." They are clothed with the power to pass ordinances "for the prevention and extinguishment of fires," for "securing persons and property from danger or destruction, and for promoting the great interests and insuring the good government of the city," and "to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city." It has been well said in reference to such general grants of power that as to the degree of necessity for municipal legislation on the subjects thus committed to their charge, the Mayor and City Council are the exclusive judges, while the selection of the means and manner (contributory to

case. Mayor does not agree. Only resolution power was given. Like salvation army case.

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This case is after cited.
Discussion is; that this ordinance does not part to confer arbitrary authority. Such an ordinance it is not supposed the legislature ever gave the power to the city to enact. Sup. the legislature had enacted just the same thing as here; and it be true that not one scope of the

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the end) of exercising the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their sound discretion. *Harrison v. Mayor, &c.*, 1 Gill, 264. This discretion is very broad, but it is not absolutely and in all cases beyond judicial control. Modern decisions in other States have in some instances extended the control of the courts over municipal ordinances upon the ground of their unreasonableness, further perhaps than the adjudications in this State would justify us in going. The cases on this subject and the conclusions to be drawn from them are well stated by Judge Dillon in his admirable work on Municipal Corporations, in sections 253 to 260. They will also be found collected in Wood on Nuisances, 774, note 1. While we may not be willing to adopt and follow many of those cases, and while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an ordinance passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority. In applying the doctrine of judicial control to this extent, we contravene no decisions in our own State and impose no unnecessary restraints upon the action of municipal bodies. The inquiry then arises is the ordinance in question such as we have described? To answer this question it is necessary to consider briefly upon what it operates and what mischiefs or wrongs it is capable of inflicting. It is matter of common knowledge as well as of proof in this case, that the use of steam-engines is absolutely necessary for the successful prosecution of nearly all the various manufacturing, commercial, industrial, and business enterprises which are essential to the prosperity of large cities. Great numbers of them are in constant use in the city of Baltimore for purposes so varied and numerous as to embarrass description, and they are to be found in every business locality and in all sections of the town. In fact, it may be safely affirmed that their use could not be prohibited or discontinued without the most serious impairment, if not destruction, of the prosperity and growth of the city. Now it is with these powerful and dangerous but most important and valuable aids to human industry, that this ordinance deals, and what does it do? It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box-factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and

order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives, easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void. Resting our decision as to the invalidity of this ordinance on this ground, we shall not consider the question whether it is also void as an unauthorized delegation of a public power or trust. In the view we have taken of the case, it becomes unnecessary to express any opinion upon that question. It must also be observed that what we have declared void is only that part of the ordinance of 1864, which gives to the Mayor the power to revoke permits for steam engines and boilers, and we are not to be understood as expressing any disapproval of the section of the ordinance of 1858, which requires a permit from the Mayor and City Council for the erection of all such engines within the city limits. The Act of 1872, ch. 153, which was referred to by the appellant's counsel as containing a ratification and approval by the legislature of both these ordinances, contains no reference to the ordinance of 1864. The section of that Act which is relied on for this ratification and approval simply provides that "nothing in this Act shall conflict with the ordinance of the Mayor and City Council of Baltimore, which requires their permission for the erection of steam-boilers in that city." This in plain terms refers exclusively to the ordinance of 1858, and we by no means affirm that it constitutes a legislative ratification and approval even of that ordinance.

As to the question of jurisdiction we have no doubt. . . . It follows that the decree appealed from must be affirmed.

*Decree affirmed.*¹

¹ See note at pp. 672-673.

In *State v. Yopp*, 97 N. C. 477, 481 (1887), the court (MERRIMON, J.) said: "In the case before us, the statute (Pr. Acts, 1885, ch. 14) forbids every person 'to use upon the road of said company a bicycle, or tricycle, or other non-horse vehicle, without the express permission of the superintendent of said road,' &c. The purpose of this statutory provision is not to destroy the defendant's property, — his bicycle, — or to deprive

upon a certain road belonging to a Co., a bicycle or other non-horse vehicle without the express permission of the Superintendent of the road. Held, the purpose of the statute was not to destroy the deft's property, but to deprive him of the use of it in a way

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MAYOR, ETC. OF BALTIMORE v. RADECKE.

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him of the use of it, in a way not injurious to others, but to prevent him from using it on a particular road — that mentioned — at a particular time or season, when it would, by reason of its peculiar shape, and the unusual manner of using it as a means of locomotion, prove injurious to others, — particularly women and children, constantly passing and repassing in great numbers over the particular road mentioned, in carriages and other ordinary vehicles drawn by horses. The evidence tended strongly to show, that the use of the bicycle on the road materially interfered with the exercise of the rights and safety of others in the lawful use of their carriages and horses in passing over the road. In repeated instances the horses became frightened at them, and carriages were thrown into the ditches along the side of the road. It was not uncommon for horses to become frightened at them, and become unruly, if the evidence is to be believed.

"The statute did not deprive the defendant of the use of his property, — he might have gone another way, — he might have gone at an opportune time, with the express permission of the superintendent of the road. In any case, he had no right to go, using his bicycle, at the peril of other people, he giving rise to such peril. The statute did not, therefore, in any just sense, destroy his property, as contended, or deprive him of the proper and reasonable use of it; nor was such its purpose. Its purpose was lawful, and in our judgment, it does not provide an unreasonable police regulation, — certainly not one so unreasonable as to warrant us in declaring it void. Such statutes are valid, unless the purpose, or necessary effect is, not to regulate the use of property, but to destroy it. . . .

"It is further objected, that the statute leaves it to the arbitrary discretion of the superintendent of the road named to allow or disallow persons to use 'a bicycle, or tri-cycle, or other non-horse vehicle' on it. This is a misapprehension of the true import of the provision cited. The discretion vested in the superintendent is not arbitrary. He is made the agent of the law, as well as superintendent, and he is bound to exercise the discretion vested in him honestly, fairly, reasonably, and without prejudice or partiality, for the just purpose of effectuating the intention of the statute. If there be times, or seasons, or occasions, when persons wishing to use bicycles or other like vehicles embraced by the prohibitory clause of the statute in question, it is his plain duty to allow them to do so at such times. The authority is not his; he is simply made the agent of the law for a lawful purpose, and he is amenable as such for any prostitution of the power so vested in him, and the creation of the discretion implies that there may be occasions, or times, or seasons, when bicycles may be used on the road.

"It not infrequently happens, that statutes require particular things to be done, or not to be done, that must be made to depend upon the judgment — discretion — of a designated agent or commissioner, or officer, and the discretion in such cases is not arbitrary. — it is lawful, and must be lawfully exercised.' . . .

"The learned counsel for the appellant directed our attention to the case of *Yick Wo v. Hopkins*, 118 U. S. 356. That case, in our judgment, has no application here. The court declared a city ordinance void, upon the ground that its manifest purpose was not a just and reasonable regulation, but unlawful, and the discretionary powers conferred upon certain authorities of the city were purely arbitrary — intentionally so — and therefore unlawful and void. And the same may be said of *Mayor and C. of Baltimore v. Radecke*, 49 Md. 217, cited in the case above mentioned. In our case, the purpose of the statute is obviously a lawful one, — a proper regulation of the use of property, — and the designation of the agent, and the discretionary power conferred upon him, is for the lawful purpose of effectuating the just intent of the statute, and he is amenable, as we have indicated above." Compare *Twilley v. Perkins*, 26 Atl. Rep 286 (Md. 1893). — Ed.

Did they check

STATE v. DERING.

SUPREME COURT OF WISCONSIN. 1893.

[84 W's. 585.]

CERTIORARI to a court commissioner of Columbia County.

This is a proceeding by certiorari to review the decision of C. L. Dering, court commissioner of Columbia County, in the matter of his refusal to discharge the petitioner, Joseph Garrabad, from custody, and remanding him to the imprisonment of which he complains. It appears from the return of the sheriff of Columbia County to the writ of habeas corpus issued by the commissioner, that on the 27th day of February, 1893, the petitioner was placed in his custody, and was held therein, under and by virtue of an execution or so-called "commitment," issued by V. Helman, a justice of the peace of the city of Portage in said county, reciting that the city of Portage had recovered a judgment before said justice against the petitioner for the sum of \$5, together with \$13.85 costs of suit, for the violation of an ordinance of said city, to wit, No. 124, entitled "An Ordinance to regulate Street Parades and insure Public Safety," and commanding the sheriff or any constable of the county to levy the same on the goods and chattels of the said petitioner except such as the law exempts, and in default thereof to take his body and him convey and deliver to the keeper of the common jail of Columbia County, to be there kept in custody for the term of twenty days, unless said judgment with costs was sooner paid or he should be discharged by due course of law.

The ordinance in question provides that "it shall be unlawful for any person or persons, society, association, or organization, under whatsoever name, to march or parade over or upon" certain streets (therein named) in the city of Portage, "shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet, without first having obtained a permission to so march or parade, signed by the mayor of said city." In case of illness or absence of the mayor or other officer hereby designated of the city, such permission may be granted and signed by the president of the council, city clerk, or marshal, in the order named: provided, that this section shall not apply to funerals, fire companies, nor regularly organized companies of the State militia: and provided, further, that permission to march or parade shall at no time be refused to any political party having a regular State organization. Any person violating any of the provisions of this ordinance shall, upon conviction thereof, be fined in a sum not less than two dollars or more than ten dollars." The second section provided that the marshal should accompany such person or persons receiving permission while upon the portion of the streets described, to preserve order, warn the owners of

party having a regular state organization. Dept. paraded with the salvation army and was fined \$22 and costs there having been no permission to parade. On a proceeding by certiorari to review for refusal to

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horses upon said portions of said streets, and to carefully preserve the public safety; and when such permission is given by any officer other than the marshal, that he should forthwith notify the marshal of the granting of the same.

The sheriff further returned that "the central part of the business portion of the city of Portage is contained within the limits defined in the ordinance, and the streets therein referred to were narrow, and cross and enter each other at various angles, and there was a great deal of traffic over the same, and that the petitioner had been duly and lawfully convicted of a wilful violation of said ordinance upon trial duly and legally had."

The petitioner demurred to the return, and the commissioner overruled the demurrer and ordered that he be remanded to the custody of the sheriff, to be confined in the county jail of said county according to the terms of said execution.

For the relator there was a brief by *Rogers & Hall*, and oral argument by *F. W. Hall*.

W. S. Stroud, for the respondent.

PINNEY, J. . . . It is objected that the ordinance is void on its face, by reason of its operating unequally and creating an unjust and illegal discrimination, not only (1) by the express terms of the ordinance itself, but (2) it is so framed as to punish the petitioner for what is permitted to others as lawful, without any distinction of circumstances, whereby an unjust and illegal discrimination occurs in its execution, and which, though not made by the ordinance in express terms, is made possible by it; (3) in that it vests in the mayor, or other officers of the city named in it, power to arbitrarily deny persons and other societies or organizations the right secured by it to others to march and parade on the streets named. The general subject and scope of the ordinance is marching or parading by "any person or persons, society, association, or organization" over the streets named, "shouting, singing, or beating drums or tambourines, or playing upon any musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet," without having obtained permission as prescribed in the ordinance. It provides, among other things, that the ordinance shall not apply to fire companies, nor to regularly organized companies of the State militia, and that permission to march or parade shall at no time be refused to any political party having a regular State organization. The permission, it will be seen, is required absolutely to be granted to political parties having a regular State organization, so they are practically excepted out of the ordinance. Whether permission shall be granted to any other society, civic, religious, or otherwise, depends not upon the character of the organization, or upon the particular circumstances of the case, but upon the arbitrary discretion of the mayor or other officers named in the ordinance, acting in his absence. It is therefore argued that, as between different persons, societies, associations, or organiza-

tions, the ordinance operates unequally and creates unjust and illegal discriminations by its express terms, and makes such discriminations not only possible but necessary in its administration, and therefore that the ordinance is void upon common-law principles, as heretofore recognized and administered in the courts of the country.

*Typical
bad case*

The rights of persons, societies, and organizations to parade and have processions on the streets with music, banners, songs, and shouting, is a well-established right, and, indeed, the ordinance upon its face recognizes to a certain extent the legality of such processions and parades, and provides for permitting them, in the discretion of the mayor, in all cases except those named, and as to those the right is practically secured. The ordinance, as framed, and as it is to be executed under the arbitrary discretion of the mayor or other officer, is clearly an abridgment of the rights of the people; and in many cases it practically prevents those public demonstrations that are the most natural product of common aims and kindred purposes. "It discourages united effort to attract public attention and challenge public examination and criticism of the associated purposes." *Anderson v. Wellington*, 40 Kan. 173, contains a careful discussion and examination of a similar ordinance, which was there held to be void as contravening common right. In *In re Frazee*, 63 Mich. 396, after a full discussion by Campbell, C. J., a similar ordinance was also held void, and that it is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers; that charters, laws, and regulations, to be valid, must be capable of construction, and must be construed, in conformity to constitutional principles and in harmony with the general laws of the land; and that any by-law which violates any of the recognized principles of lawful and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms; and no grant of absolute discretion to suppress lawful action can be sustained at all; that it is a fundamental condition of all liberty, and necessary to civil society, that men must exercise their rights in harmony with and yield to such restrictions as are necessary to produce peace and good order; and it is not competent to make any exceptions for or against the so-called "Salvation Army" because of its theories concerning practical work; that in law it has the same right, and is subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar means for drawing attention or creating interest. Hence the by-law there in question, because it suppressed what was in general perfectly lawful, and left the power of permitting or restraining processions and their courses to an unlawful official discretion, was held void; and that any regulation, to be valid, must be by permanent legal provisions, operating generally and impartially.

The return of the sheriff utterly fails to show of what specific offence the petitioner was convicted; that is to say, in what particular respect he violated the ordinance. We may infer, however, for the purpose of

argument and illustration, from the fact that the petition for the writ addressed to this court states that the petitioner is a member of the Salvation Army, that he was convicted of parading the streets in that capacity. It cannot be maintained that any person or persons or society have any right for religious purposes or as religious bodies to use the streets for purposes of public parade because the purpose in view is purely religious and not secular, but they certainly have the same right to equal protection of the laws as secular organizations. The objections urged against this ordinance are, we think, fatal to any conviction which might take place under it, by reason of its unreasonable and unjust discriminations and of the arbitrary power conferred upon the mayor or other officer of the city to make others in its administration and execution; so that it is impossible to sustain the conviction in any aspect in which the question may be viewed.

A careful examination of the decisions in various States, and the considerations upon which they are founded, is not material to the determination of the case, for the whole subject is governed and controlled by the provisions of the Fourteenth Amendment to the Constitution of the United States, already referred to. In construing and applying this amendment, the Supreme Court of the United States have said in *Barbier v. Connolly*, 113 U. S. 27, that it "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." The entire subject underwent careful examination in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, where the subject of city ordinances and the principles regulating their validity were considered. The objections to the validity of the ordinances in that case were, in substance, the same that are urged in this, and the ordinances in question were held void. The objections urged in the case of *Baltimore v. Radecke*, 49 Md. 217, were also in substance the same, for the ordinance in that case upon its face committed to the unrestrained will of a single public officer the power to determine the rights of parties under it, when there was nothing in the ordinance to guide or control his action, and it was held void because "it lays down no rules by which its impartial

execution can be secured, or partiality and oppression prevented," and that "when we remember that action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void." The doctrine of this case was approved in *Yick Wo v. Hopkins*, 118 U. S. 356. . . .

Nearly all the processions, parades, etc., that ordinarily occur are excepted from the ordinance in question, followed by a provision that permission to march or parade shall at no time "be refused to any political party having a regular State organization." [It is difficult to see how this can be considered municipal legislation, dictated by a fair and equal mind, which takes care to protect and provide for the parades and processions with trumpets, drums, banners, and all the accompaniments of political turn-outs and processions, and at the same time provides, in effect, that the Salvation Army, or a Sunday-school, or a temperance organization with music, banners, and devices, or a lodge of Odd Fellows or Masons, shall not in like manner parade or march in procession on the streets named without getting permission of the mayor, and that it shall rest within the arbitrary, uncontrolled discretion of this officer whether they shall have it at all.] *Does ordinance* The ordinance resembles more nearly the means and instrumentalities frequently resorted to in practising against and upon persons, societies, and organizations a petty tyranny, the result of prejudice, bigotry, and intolerance, than any fair or legitimate provision in the exercise of the police power of the State to protect the public peace and safety. It is entirely un-American and in conflict with the principles of our institutions and all modern ideas of civil liberty. It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights. In the exercise of the police power the common council may, in its discretion, regulate the exercise of such rights in a reasonable manner, but cannot suppress them, directly or indirectly, by attempting to commit the power of doing so to the mayor or any other officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority, making him in its exercise a petty tyrant. Such ordinances or regulations, to be valid, must have an equal and uniform application to all persons, societies, or organizations similarly circumstanced, and not be susceptible of unjust discriminations, which may be arbitrarily practised to the hurt,

prejudice, or annoyance of any. An ordinance which expressly secures to political parties having State organizations the absolute right to street parades and processions, with all their usual accompaniments, and denies it to the societies and other like organizations already mentioned, except by permission of the mayor, who may arbitrarily refuse it, is not valid, and offends against all well-established ideas of civil and religious liberty. The people do not hold rights as important and well settled as the right to assemble and have public parades and processions with music and banners and shouting and songs, in support of any laudable or lawful cause, subject to the power of any public officer to interdict or prevent them. Our government is "a government of laws and not of men," and these principles, well established by the courts, by the Fourteenth Amendment to the Constitution of the United States, have become a part of the supreme law of the land, so that no officer, body, or lawful authority, can "deny to any person the equal protection of the laws." It is plain that the ordinance in question is illegal and void, and for this reason the order of the commissioner must be reversed.

By the Court.—The order of the court commissioner is reversed, and the petitioner ordered discharged.¹

A plumber was indicted for refusing to comply with provisions of an Act which provided that no

SINGER v. MARYLAND.

MARYLAND COURT OF APPEALS. 1890.

[72 Md. 464.]

APPEAL as upon writ of error from the Criminal Court of Baltimore. The case is stated in the opinion of the court.

The cause was argued before ALVEY, C. J., MILLER, ROBINSON, BRYAN, FOWLER, MCSHERRY, and BRISCOE, JJ. *David Stewart*, for the appellant; *Edgar H. Gans* and *William Pinkney Whyte*, Attorney-General, for the appellee.

ROBINSON, J., delivered the opinion of the court.

The traverser is a plumber by trade, and was indicted for refusing to comply with the requirements of the Act of 1886, c. 439, which provides that no person shall engage in the business of plumbing in the city of Baltimore unless such person shall have received from the State Board of Commissioners of Practical Plumbing a certificate as to his competency and qualification. This Act the traverser contends is in violation of his constitutional rights under the Fourteenth Amendment of the Constitution of the United States and of the Constitution of this State, both of which declare that no person shall be deprived of his life, liberty, or property without due process of law. These constitutional safeguards have been so fully considered and discussed by the Supreme

¹ See *Youngblood v. Birm. Co.*, 95 Ala. 521; see also *ante*, p. 673, note. — Ed.

act was unconstitutional in that it deprived him of his own labor and the right to use it as a means of livelihood. If such a right is subject to the paramount right, inherent in every govt., to provide such regulations as

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require - In a large city like Baltimore largely dependent
upon the proper and efficient manner in which the
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CHAP. V.] SINGER v. MARYLAND. 875

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Court, especially since the adoption of the Fourteenth Amendment, by which the restraint upon the power of the States to pass laws affecting personal and private rights was made a part of the Federal Constitution, that it can only be necessary to refer to the conclusions reached by that court as affecting the question before us. *Dent v. West Virginia*, 129 U. S. 114; *Barbier v. Connolly*, 113 U. S. 27; *Mugler v. Kansas*, 123 U. S. 623; *Soon Hing v. Crowley*, 113 U. S. 703; *Powell v. Pennsylvania*, 127 U. S. 678. No one questions the right of every person in this country to follow any legitimate business or occupation he may see fit. This is a privilege open alike to every one. His own labor, and the right to use it as a means of livelihood, is a right as sacred and as fully protected by the law as any other personal or private right. But broad and comprehensive as this right may be, it is subject to the paramount right, inherent in every government, to impose such restraint and to provide such regulations in regard to the pursuits of life as the public welfare may require. This paramount right rests upon the well-recognized maxim, *Salus populi est suprema lex*; and, whatever difficulty there may be in defining the precise limits and boundaries by which the exercise of this power is to be governed, all agree that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power. *Powell v. Pennsylvania*, 127 U. S. 678; *Mugler v. Kansas*, 123 U. S. 623; *Railway Co. v. Beckwith*, 129 U. S. 26. As to the common and ordinary occupations of life, little or no regulation may be necessary; but if the occupation or calling be of such a character as to require a special course of study or training or experience to qualify one to pursue such occupation or calling with safety to the public interests, no one questions the power of the legislature to impose such restraints, and prescribe such requirements, as it may deem proper for the protection of the public against the evils resulting from incapacity and ignorance; and neither section one of the Fourteenth Amendment of the Federal Constitution, nor article 23 of the Bill of Rights of the Constitution of this State, was designed to limit or restrain the exercise of this power. It is in the exercise of this power that no one is allowed to practise law or medicine or engage in the business of a druggist unless he shall have been found competent, and qualified in the mode and in the manner prescribed by the statute; and, although the business and trade of a plumber may not require the same training and experience as some other pursuits in life, yet a certain degree of training is absolutely necessary to qualify one as a competent and skilful workman. We all know that in a large city like Baltimore, with its extensive system of drainage and sewerage, the public health largely depends upon the proper and efficient manner in which the plumbing work is executed, and, this being so, the legislature not only has the power, but it is eminently wise and proper that it should, provide some mode by which the qualifications of persons engaged in that business shall be determined.

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In considering the power of the legislature to impose restraints upon all persons engaged in certain pursuits, the Supreme Court say: "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable application, no objection to their validity can be raised." *Dent v. West Virginia*, 129 U. S. 114. The Act of 1886 now before us provides in the first place that no one shall engage in the business of plumbing except those qualified to work as registered plumbers; and, further, that no one shall be qualified to work as a registered plumber unless he shall have made application to and received from the State Board of Practical Plumbers appointed by the government a certificate as to his competency. These requirements are appropriate, and relate to the business of plumbing, and are such as the legislature deemed necessary and proper for the protection of the health of the people of Baltimore against the consequences resulting from the work of incompetent and inexperienced plumbers. They are in themselves fair and reasonable, and impose no restraint or qualification which may not be complied with by reasonable training and experience. Such an Act is but the ordinary exercise of the police power of the State, and does not violate in any sense the constitutional rights of the traverser.

*Judgment affirmed.*¹

¹ And so *State v. Heinemann*, 80 Wis. 253, as to pharmacists; and *People v. Phippin*, 70 Mich. 6 (1888), as to medical men and surgeons, CAMPBELL and MORSE, JJ., dissenting. Compare *State v. Pennoyer*, 65 N. H. 113 (1889), which holds unconstitutional, as being unequal, an exemption from the requirements of such a statute in favor of medical men who have resided and practised their profession in the place of their present residence for the last four years. A similar clause was sustained in *People v. Phippin*, *ubi supra*, the court (LONG, J., at p. 24) saying: "This Act . . . makes a medical qualification the test of the right to practise. The real test of the right to practise is that he shall be a 'graduate of any legally authorized medical college in this State, or in any one of the United States, or in any other country.' And in this there is no discrimination. Now, the legislature saw fit in establishing this test, to except from its provisions a certain class of physicians and surgeons. In so doing it in effect declared that the physician or surgeon who had actually practised medicine continuously for at least five years in this State, and who is practising when this Act shall take effect, was as well qualified, in its judgment, to continue the practice of his profession as the student coming fresh from the halls of college with his diploma was to commence it. The reasons which induced the legislature to insert the exception may have been as varied as the different minds of its members. It certainly had power to insert it, and whether the power was reasonably or unreasonably exercised, or whether it was expedient to enact the law, are questions exclusively within the province of the legislative branch of the State government, and their judgment must necessarily be decisive upon these questions. *State v. Dent*, 25 W. Va. 1; *Ex parte Spunney*, 10 Nev. 328; *Wert v. Clutter*, 37 Ohio St. 347."

In *Trageser v. Gray*, 73 Maryland, 250 (1890), a non-naturalized Prussian applied for a writ of mandamus to compel certain commissioners to issue to him a license for the sale of intoxicating liquors. His petition was dismissed; and by a proceeding in the nature of a writ of error, he now raised the question whether the Maryland statute of 1890, c. 343, for regulating the sale of intoxicating liquors, was valid. The court (BRYAN, J.) in affirming the order of the court below, said "In the law which we are now considering, the legislature hedged around this traffic with such safeguards

Non naturalized Prussian has no right to sell liquors

Police power not an exclusive privilege of the State. It is a power which may be exercised by the State or by the people. It is a power which may be exercised by the State or by the people. It is a power which may be exercised by the State or by the people.

as were deemed advisable for the purpose of protecting the public interest. It was an effort to restrict the licenses to such persons as would not abuse the privilege conferred; to this end the applicant was required to establish his fitness for the privilege by abundant testimony, and to promise, under oath, that he would not permit on his premises certain violations of the law, which have frequently been associated with the traffic, and which have caused great scandal, immorality, and disorder. And by section 653*f*, it was enacted that the license should be refused in all cases, whenever, in the opinion of the said board, such license is not necessary for the accommodation of the public, or the petitioner or petitioners is or are not fit persons to whom such license should be granted; and if sufficient cause shall at any time be shown, or proof be made to the said board, that the party licensed was guilty of any fraud in procuring such license, or has violated any law of the State relating to the sales of intoxicating liquor, the said board shall, after giving notice to the person so licensed, revoke said license; and the criminal court of the city may in like manner revoke said license, if the party should be convicted before it, of any such violation. It was thought proper to confine the license to citizens of the United States, of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice, that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question and this court has no right to criticise its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of this State.

"We regard it as included 'in that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government.'" *Gibbons v. Ogden*, 9 Wheaton, 203. It has been uniformly held in all courts that no clause in the Federal Constitution interferes with the power of the States to promote and protect the public health, peace, morals, and good order within their respective limits. . . . It is, however, maintained by the appellant that although this statute was passed apparently for the purpose of exercising this power, yet it is in conflict with the Fourteenth Amendment, because it denies to persons not citizens of the United States the right to obtain licenses to retail liquor, and thereby makes an unconstitutional discrimination against them. The section of the amendment supposed to be involved is in these words: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It cannot be said that any man, alien or citizen, has a natural right to retail intoxicating liquor. According to *Bartemeyer v. Iowa*, 18 Wallace, 129, it is not one of the privileges and immunities of citizens of the United States. In *Mugler v. Kansas*, 123 U. S. 623, it was said that 'such a right did not inhere in citizenship,' and that it could not be said that government interfered with or impaired any one's constitutional rights of liberty or property, when it prohibited the manufacture and sale of intoxicating drinks. And it was held that this prohibition might be made although it would destroy or greatly diminish the value of manufactories, which had been erected when it was lawful to engage in such business. In *Kidd v. Pearson*, 128 U. S. 1, a statute of Iowa prohibited the manufacture or sale of intoxicating liquors except for mechanical, medicinal, culinary, and sacramental purposes; but any citizen of the State was permitted to manufacture or buy and sell for these purposes, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers, and confectioners. The Supreme Court decided that the statute did not in any way contravene any provision of the Fourteenth Amendment. We see that the privilege granted was confined to citizens of the State, and that there was a discrimination against five classes of these citizens. But in truth, the valid exercise of the police power does not depend on any question of discrimination for or against particu-

lar persons or classes of persons. It is confided to the wisdom of the legislature to make such application of it as the public welfare may require. In the case of occupations which may become injurious to the community, they may prohibit them altogether, or they may permit them only in certain localities and on certain terms and under certain restrictions, or they may grant the privilege of pursuing them to some persons and deny it to others. Individual interests are not all considered in the exercise of this power. They must yield when they are in opposition to the public good. And the legislature is to determine what measures will best promote the public good in dealing with these matters. In *Mugler v. Kansas* it was said that it was not to be supposed that the Fourteenth Amendment was intended to impose restraints on the exercise of the police power by the States. It was also said that a State could not by any contract limit its exercise of this power where the public health and the public morals would be prejudiced; and a case was cited with approval (*Stone v. Mississippi*, 101 U. S. 814), where a charter to conduct a lottery had been granted to a private corporation for a large moneyed consideration, and was afterwards repealed, and the repeal was sustained as within the police power of the State. And in the same case the court stated with great emphasis the necessity of upholding State police regulations which were enacted in good faith and which had appropriate and direct connection with that protection to life, health, and property which each State owes to its citizens. And in this case, and subsequently in *Powell v. Pennsylvania*, 127 U. S. 684, it was shown that a statute enacted in good faith for the exercise of the police power could not be regarded as repugnant to the Fourteenth Amendment, unless it had no real or substantial relation to the objects of such power. In the *Slaughter-House Cases* (16 Wallace, 86), it was held that in the exercise of the police power the State of Louisiana could lawfully grant to a single corporation, for twenty-five years, the exclusive privilege of maintaining slaughter-houses in a district of country containing more than eleven hundred square miles, and including the city of New Orleans. The trade of a butcher, though of great utility and necessity, is liable under some circumstances to injure the public health, and was, therefore, liable to this sort of legislation.

"There are cases, unquestionably, in which discriminations against particular persons or classes of persons would be unlawful. They are indicated in *Powell v. Pennsylvania* and in many other cases, especially in the cases affecting the legislation of California on the subject of the Chinese. It is held that every one has a right to pursue an ordinary calling on terms of equality with all other persons in similar circumstances; that is, a calling not in any way injurious to the community, or likely to become so. The court did not, in *Powell v. Pennsylvania*, regard the making of oleomargarine as an ordinary business; nor in *McGahey v. Virginia*, 135 U. S. 712, was the traffic in ardent spirits so regarded. In the *Chinese Cases*, *Re Parrott*, 6 Sawyer, 349; *Re Ah Chong*, 6 Sawyer, 451, and *Yick Wo. v. Hopkins*, 118 U. S. 356, the legislation in question was directed against the Chinese, and was intended to prevent them from earning a livelihood by their own labor; or, at least, to impede and embarrass them as much as possible in their efforts to do so. This was most clearly evident, not only from the statutes and ordinances themselves, but from the article in the Constitution of California, under which they were framed. This article (19th) was entitled 'Chinese,' and it provided that no corporation should employ, directly or indirectly, in any capacity, any Chinese or Mongolian; that no Chinese should be employed on any State, county, municipal or other work, except in punishment for crime; it declared that the presence of foreigners ineligible to become citizens (meaning the Chinese) was dangerous to the well-being of the State; and the legislature were directed to discourage their immigration by all means within their power, and were also directed to delegate all necessary power to the incorporated cities and towns of the State for the removal of Chinese beyond their limits, or for their location within prescribed portions of those limits; and were also directed to provide the necessary legislation to prohibit the introduction of Chinese into the State. One of the judges in *Parrott's Case* said of this article, 'It is in open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities and exemptions of the most favored nation. It is, in fact, but one and the latest of a series of

enactments designed to accomplish the same end.' 6 Sawyer, 365. It was apparent to the courts which decided these cases that, although the statutes and ordinances in question were in the form and fashion of police regulations, yet in reality, in substance and in effect, they were enactments to take away from the Chinese the right to labor for a living.

"They struck at those inalienable rights which belong to human beings at all times and in all places. They denied them the equal protection of the laws in particulars essential to their means of existence. Their evident effect and purpose were to accomplish an unconstitutional result, and therefore they were necessarily declared to be void. The statute now before us oppresses no one, and was intended to oppress no one. It does not take from any man a solitary right, privilege or immunity. It subjects no one to penalties for its violations which are not imposed equally on all offenders. It does not, it is true, make an equal partition of the privilege of liquor-selling among all classes of persons. But there is no warrant for supposing that legislative control over this traffic must conform to any such standard. It is not crippled by any such restraint. It overrides all private interests and embraces all means which are necessary and proper to protect the public from evils connected with the subject. Assuredly the Supreme Court did not consider this control as limited by the necessity of making an equal distribution of favors, when it said in speaking of the trade in liquor and its consequences: 'The police power which is exclusively in the States is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' *Mugler v. Kansas*, 123 U. S. 659. Nor is any such limitation consistent with the decisions in *Stone v. Mississippi*, 101 United States, 814; *Beer Co. v. Massachusetts*, 97 United States, 25; and *Fertilizing Company v. Hyde Park*, 97 United States, 659. In one of these cases a franchise which had been purchased from the State was taken away from the purchaser without compensation to him, because it was considered by the legislature to be hurtful to the public morals. In the other two cases, by the exertion of the police power, property of vast amount was rendered valueless, although it had been acquired under the express sanction of the legislature. It is needless to refer again to the *Slaughter-House Cases*, where there was a severe discrimination in favor of a single corporation and against every one else, solely because the protection of the public health was involved.

"It has been maintained that the appellant (Trageser) has rights under existing treaties which have been infringed by the denial of licenses to aliens. Our opinion on this question has been sufficiently indicated. But a few words more may be added. If we assume, for the sake of argument, that Trageser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that any one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a State. Such power is original, inherent and exclusive; it has never been surrendered to the general government, and never can be surrendered without imperilling the existence of civil society.

"The Act of Assembly involved in this controversy being in our opinion in all respects a valid law, it is perhaps unnecessary to say anything more; but we will observe that, even if the clause relating to aliens were unconstitutional, the other portions of the statute would not be affected. Aliens could not even, in that event, obtain licenses to sell liquor without the approval of the Board of Commissioners.

"The order refusing the *mandamus* must be affirmed.

Order affirmed."¹

ALVEY, C. J., and MCSHERRY, J., concurred in the affirmance of the order appealed from, refusing the *mandamus*, but for reasons different from those assigned in the opinion of the majority of the court.

¹ Compare *Perry v. City Gov.*, 7 Utah, 143. — ED.

RICE ET AL. v. PARKMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1820.

[16 Mass. 326.]¹

A WRIT of entry. The demandants claim as heirs of their mother (who died in 1792), and entitled to the possession upon the death of their father, in 1815, tenant by the curtesy. The tenant set up title through one Homer, to whom the father had sold the demanded premises under a legislative resolve, purporting to authorize the father, on giving bond, to sell and convey and to invest the proceeds for the use of the said children. The demandants reply, protesting that there was no such resolve or sale, and traversing the giving of the bond. Issue was joined upon the traverse, and a verdict returned, that the bond was given according to the directions of the resolve.

The demandants objected at the trial, that no authority to sell the estate could be legally derived from the said resolve; but that the same was wholly void, as respected them; especially as it did not appear that any notice was given before the license was granted. This objection was overruled by the Chief Justice, before whom the trial was had, November Term, 1818. A new trial was to be granted, if, in the opinion of the court, the said resolve did not give authority to sell as aforesaid.

Ward, for the demandants.

Gallison, for the tenant.

PARKER, C. J., delivered the opinion of the court. If the power, by which the resolve, authorizing the sale in this case, was passed, were of a judicial nature, it would be very clear, that it could not have been exercised by the legislature, without violating an express provision of the Constitution. But it does not seem to us to be of this description of power; for it was not a case of controversy between party and party; nor is there any decree or judgment, affecting the title to property. The only object of the authority granted by the legislature was, to transmute real into personal estate, for purposes beneficial to all who were interested therein.

This is a power frequently exercised by the legislature of this State, since the adoption of the Constitution; and by the legislatures of the province, and of the colony, while under the sovereignty of Great Britain; analogous to the power exercised by the British Parliament, on similar subjects, time out of mind. Indeed it seems absolutely necessary for the interest of those, who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere, to convert lands into money. For otherwise many minors might suffer, although having property; it not being in a con-

¹ The statement of facts is shortened — Ed.

not of a judicial nature. The only object of the authority granted the legislature was to transmute real into personal estate for purposes beneficial to all who were interested therein. It was frequently exercised in this country and

dition to yield an income. This power must rest in the legislature in this Commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular applications brought before them. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties; it being a (mere ministerial) act, certainly requiring discretion, and sometimes knowledge of law, for its due exercise; but still partaking in no degree of the characteristics of judicial power.

It is doubtless included in the general authority, granted by the people to the legislature in the Constitution. For full power and authority is given, from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions (so as the same be not repugnant or contrary to the Constitution), as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects thereof.

No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do; and enabling him to derive subsistence, comfort, and education from property, which might otherwise be wholly useless during that period of life, when it might be most beneficially employed.

If this be not true, then the general laws, under which so many estates of minors, persons *non compos mentis*, and others, have been sold and converted into money, are unauthorized by the Constitution, and void. For the courts derive their authority from the legislature, and it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress, who had unproductive property, and were disabled from conveying it themselves, it would seem that one of the most essential objects of government, that of providing for the welfare of the citizens, would be lost.

But the argument, which has most weight on the part of the demandants, is that the legislature has exercised its power over this subject, in the only constitutional way, by establishing a general provision; and that, having done this, their authority has ceased, they having no right

it is one that has always been exercised; and is good.

4 N. J. at p 572 - Justice in advising the legislature through that such a power would not be good

to interfere in particular cases. And if the question were one of expediency only, we should perhaps be convinced by the argument, that it would be better for all such applications to be made to the courts empowered to sustain them.

But as a question of right, we think the argument fails. The constituent, when he has delegated an authority without an interest, may do the act himself, which he has authorized another to do; and especially when that constituent is the legislature, and is not prohibited by the Constitution from exercising the authority. Indeed the whole authority might be revoked, and the legislature resume the burden of this business to itself, if in its wisdom it should determine that the common welfare required it.

It is not legislation, which must be by general acts and rules, but the use of a parental or tutorial power, for purposes of kindness, without interfering with, or prejudice to the rights of any, but those who apply for specific relief. The title of strangers is not in any degree affected by such an interposition.

In the case before us, the object sought for could not have been obtained in the ordinary way of a license from a court of law; for by that nothing could have been sold but the reversion belonging to the heirs; and the proceeds of that alone would have been put at interest; whereas, by a sale of the whole, as was authorized by the legislature, there is no doubt a better price was obtained, and the proceeds finally coming to the heirs were greater than they would otherwise have been. It is true, that the same purpose might have been effected substantially by a license to sell the reversion, and a sale of the estate for life without license by the tenant of the freehold. But still the proceeds would not have been vested so beneficially, as they were under the actual sale.

We do not consider notice to have been essential, if the fact be that none was given. The father acted as guardian, and he had no interest adverse to that of his children. Notice is not required by law to be given, upon applications for the sale of the estates of minors.¹

Judgment for the tenant on the verdict.

IN *Brevoort v. Grace et al.*, 53 N. Y. 245, 250 (1873), the Court of Appeals (GROVER, J.) said: "The real question in the case is whether the legislature has the power, by special Act, to authorize

¹ In *Holden v. James*, 11 Mass. 397, the court decided that the legislature could not suspend the operation of a general law to give a remedy in favor of an individual, although the Constitution provides that the power of suspending the laws, or the execution of the laws, may be exercised by the legislature, or by authority derived from the legislature, to be exercised in such particular cases only as the legislature shall expressly provide for; and although the practice, ever since the adoption of the Constitution, had been to enact remedial laws in like cases. But the soundness of this decision has been questioned. — ED. [of 11 Mass. Rep.]

See *Davison v. Johnnot*, 7 Met. 388; *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483; *Sohier v. Trin. Ch.*, 109 Mass. 1. — ED.

Quint v. 549

and provide for the sale of the interest of known parties who have attained their majority and who are competent to act for themselves in real estate, and convert the same into personal, and provide for the investment and management of the proceeds without their consent, upon the ground that such sale would, in their judgment, promote the interest of such parties and others who are infants or who are not in being, and cannot, therefore, provide for the management of the property. If the legislature possesses this power, the Act in question is valid in all respects, not only for the reason that in the present case it clearly appears that the life tenants would be greatly benefited by a sale, but also made highly probable that the interests of those in remainder would be promoted. It thus appears that if such power is possessed, this is a proper case for its exercise. But if the legislature possesses the power, it also has the power to determine whether the case presented is one proper for its exercise, and its determination is conclusive, as also of the mode and safeguards under which it shall be exercised. Henry Brevoort has, under the will, the remainder in fee in case he shall survive his mother, subject to open and let in any other children of Mrs. Brevoort who may hereafter be born, who shall survive her. We have seen that his title would pass under the deed of the referee, for the reason that he united in the petition and thereby assented to the proceedings under which the sale was made.

“Special Acts of the Legislature, authorizing the sale of the real estate of infants and others incapable of acting for themselves, have been held valid in this State, and that a valid title as to such persons is acquired under sales pursuant to such Acts. *Clarke v. Van Surlay*, 15 Wend. 436. The same case was before the Court of Errors in the name of *Cochrane and Wife v. Van Surlay*, 20 Wend. 365, when the same rule was held, based upon the same reason, that it was the legitimate exercise of that paternal power over the persons and property of infants, which under the common law was an inherent right of sovereign power, which might be exercised under general laws or under peculiar circumstances by special legislation. But in his opinion in this case, Verplanck, Senator, says, speaking of clauses in the Constitution of 1822 which are also contained in the present Constitution: ‘Further protection is given to property by adding a prohibition against the taking of private property for public use without just compensation, and also another against the depriving any one of life or property without due process of law and by mere arbitrary legislation, under whatever pretext of public or private good.’

“In *Williamson v. Berry*, 8 How. 495, and in a subsequent case, the Supreme Court of the United States determined differently upon the same title, but the difference between that and the courts of this State was not as to the power of the legislature to authorize the sale, but as to whether the consent of the Chancellor, etc., which was required by the Act, had been properly given, so as to give validity to the sale.

“In *Suydam v. Williamson*, 24 How. 427, the United States Supreme

Court abandoned the decision made in *Williamson v. Berry*, *supra*, and adopted and followed the decisions of the courts of this State, under the salutary rule that when any principle of law establishing a rule of real property has been settled by the courts of a State, that rule will be applied by the Federal courts in cases where the latter acquire jurisdiction of cases within the State by reason of the character or residence of the parties.

“ In *Towle v. Forney*, 4 Duer, 164, the doctrine of *Cochrane v. Surley* was reaffirmed by this court. Other cases, to the same effect, might be cited, but from those, *supra*, it is clear that a special Act of the Legislature, authorizing the sale of the lands of infants, etc., is within the constitutional power of the legislature.

“ Doubts were expressed in some of the cases, *supra*, whether this power extended to those not in being, who might thereafter be entitled to some estate in the premises. The reasons upon which the rule is based as to the former, apply with equal force as to the latter. In both there is a want of capacity to manage and preserve the property, so as to protect the interest of those who are or may become entitled thereto, and hence the necessity of devolving this duty upon the sovereign. For this purpose the legislature, under our system, represents and possesses the powers of the sovereign authority, and may discharge the duty either by general or special laws, as will best protect the rights of those interested, although it is obvious that the former should be preferred in all cases where practicable.

“ *Mead v. Mitchell*, 17 N. Y. 210, was a case of partition, in which it was held that a valid sale of the future contingent interests of those not in being might be made pursuant to the judgment in the action. Although this is not an authority precisely in point, yet the judgment, as well as the opinions, show that such interests were equally within the control of the legislature as those of infants, etc.

“ Having arrived at the conclusion that the legislature may, by special Act, authorize the sale of the lands of those not capable of acting for themselves, and also the contingent rights of those not *in esse*, it follows that a valid title would have passed by virtue of the deed of the referee, as to any future children of Mrs. Brevoort, or any issue of Henry Brevoort hereafter born. This would make the title valid as against everybody except Mrs. Lefferts, the widow of the testator, and the heirs of the children of his brother John. No point is made as to the right of the former; I shall therefore assume that as to her the title has been made satisfactory, as it very readily might be.

“ The question then is as to the rights of the adult heirs of the children of the testator's brother John. In the event of the death of Mrs. Brevoort, leaving no issue surviving, an event which is possible, the title to the premises would vest in part in these adult heirs as tenants in common with the other heirs, who are now infants, unless these rights are barred by the sale under the statute. The question is thus presented, whether the legislature can, by a special statute, authorize the sale of

lands to which adults, competent to act for themselves, have a contingent right, and thus cut off such contingent interest therein, should such events occur as would give the title in whole or part to those having such interest.

“It is urged by the counsel for the appellants that such interest is not barred, for the reason that the adult heirs were not parties to and had no notice of the proceedings. To this the counsel for the respondent answers, that it was not necessary to make them parties or give them notice, as their interest was contingent, and represented by Henry Brevoort, who was a party, and who had a prior vested remainder in fee, subject to be defeated by his death during the life of his mother, Mrs. Brevoort, and cites *Clarke v. Cordis*, 4 Allen, 466, *Nodine v. Greenfield*, 7 Paige, 544, and *Mead v. Mitchell*, 17 N. Y. 210, in support of the position. In regard to this, I think that if the legislature possesses the power to authorize the sale, and thus cut off the rights of parties, the mode and manner of conducting it are questions for its determination. The questions whether the interest of all parties will be promoted by a sale, and whether a sale shall be made, when and how, may be determined in the statute; or power to hear and determine all or any of them may by the Act be conferred upon the courts, and in case the latter course is adopted, the Act may provide as to who shall be made parties, and have notice of the proceedings, as the legislature shall judge necessary and sufficient for the protection of all interests to be affected by the sale.

“The real question is whether the legislature has the power, by a sale under a special Act, to extinguish the rights of those of legal capacity to act for themselves in real estate, vested or contingent, upon the ground that in its judgment, or of that of any of the judicial tribunals of the State, the interests of all would be promoted thereby, without the consent of such parties. This precise question was decided in the negative by this court in *Powers v. Bergen*, 2 Selden, 358. The validity of the statute was, in that case, attempted to be upheld, upon the ground that a sale was necessary to provide for the payment of taxes and assessments; but the opinion shows that neither the Act nor the proceedings showed any such foundation therefor. In the present case the Act and proceedings show that the premises were largely inumbered by both; but the difficulty is, that the quantity of land authorized to be sold, and which, in fact, was sold, was not limited to the quantity necessary for that purpose. The Act authorized the sale of the entire premises, and, under its provisions, all have been sold, in the aggregate, for about eight hundred thousand dollars, a part of which were purchased by the appellants. Surely a sale of land, which was already subdivided into parcels and sold in that manner, cannot be upheld on the ground that it was necessary for the payment of taxes and assessments amounting only to a small part of that sum. The Act could only be sustained upon that ground by limiting the sale to a quantity necessary for those purposes. In the case last cited, the learned judge concedes the power

of the legislature, in acting as the guardian and protector of those incapable of acting for themselves by reason of infancy, lunacy, etc., to pass general or special laws under which an effectual disposition of their lands and other property may be made in order to promote their interests; and, after an allusion to the fact that, in England, private Acts of Parliament are a mode of assurance, proceeds to say that here the sovereign and absolute power resides in the people, and that the legislature can exercise such powers only as have been delegated to it. The right of eminent domain or inherent sovereign power gives the legislature control of private property for public uses, and only for such uses; in such cases, the interest of the public is deemed paramount to that of any individual, and yet, even here, the Constitution of the United States and the Constitution of this State have imposed a salutary check upon the exercise of legislative power for that purpose, by providing that private property shall not be taken for public use without just compensation. It follows that if the legislature should pass an Act to take private property for a purpose not of a public nature, or if it should provide, through certain forms to be observed, to take the property of one and give it or sell it, which is the same thing in principle, to another; or, if it should vacate a grant of property under the pretext of some public use, such cases would be gross abuses of the discretion of the legislature and fraudulent attacks on private rights, and the law would be clearly unconstitutional and void. 2 Kent's Com. 340. If the power exists to take the property of one without his consent and transfer it to another, it may as well be exercised without making compensation as with it, for there is no provision in the Constitution that just compensation shall be made to the owner when his property shall be taken for private use. The power of making contracts for the sale and disposition of private property for individual owners has not been delegated to the legislature, or to others, through or by any agency conferred on them for such purpose by it; and if the title of A. to the property can, without his fault, be transferred to B., it may as well be effected without as with a consideration. After citing and commenting upon some authorities, the judge concludes by holding the Act void, and that a good title was not acquired by a deed given pursuant to a sale made under its provisions. The court unanimously concurred in this conclusion. The only difference between that and the present case is, that in that the existing children of the testator's daughter Eliza, to whom the fee was given in case their mother died in their lifetime, were not required to be and were not made parties to the proceeding, while in the present, Henry Brevoort, the only child of Mrs. Brevoort, was so required by the Act, and was a party. This difference will be hereafter considered.

“The counsel for the respondents insists that the principle upon which *Powers v. Bergen* was decided was modified or restricted by the same court in *Leggett v. Hunter*, 19 N. Y. 446. In the latter the court held, first, that the trustee had power, under the will, to sell and convey the lands in question in the absence of any Act of the Legislature conferring

authority for that purpose upon him, and also that the Act by which such authority was conferred was constitutional and valid. It appears, from the report, that all the members of the court concurred in the result, and that the necessary number to decide concurred upon both points. The report shows that it was not designed in the latter to overrule the former upon the point last considered in the opinion, but to distinguish the case then under consideration from that. In *Leggett v. Hunter*, it appeared that Gerardus Post was owner in fee at the time of his death; that he left five children, three sons and two daughters, surviving; that, by his will, he devised one-fifth of his real estate to each of his sons in fee, and two-fifths thereof to trustees during the lives of his two daughters, one in trust for each daughter during her life, remainder in fee to her issue. The will made no devise over, in case the daughter died leaving no issue. It appeared that the daughter who was entitled to the income of the lands in question, for life, had children who were infants at the time of the passage of the Act and of the sale, the validity of which was the question involved in the questions submitted. Clearly as to these infants the statute and sale were valid by all the authorities, and valid, as we have seen, as to any after-born children of the daughter. The latter point is discussed in the opinion, and the conclusion adopted that the sale under the Act would be valid as to such children. But nothing is said in the opinion as to the rights of the adult heirs of the testator in case the daughter died without issue. This remainder was undisposed of by the will, and descended to the heirs of the testator. The case is entirely silent as to this; and whether at the time these heirs or any of them, except the daughter, were adults, does not appear. In the opinion the judge says: 'The court decided, in *Powers v. Bergen*, that the legislature (except in cases of necessity arising from infancy, insanity, or other incompetency of those in whose behalf it acts) has no power to authorize by special Act the sale of private property for other than public uses without the consent of the owner.' This is a correct statement of the point decided. He then proceeds to state that in that case no reason appeared, and then, as I think, losing sight of the only reasons upon which such legislation can be sustained, proceeds to distinguish that case from that he was considering, by showing the probably great pecuniary benefits to be derived from a sale in the one then in judgment. The power cannot be based upon such considerations. The great confusion of titles that would ensue by holding the sale valid if advantageous to the parties interested, but if otherwise invalid, must have escaped the attention of the learned judge. As already remarked, when power is given to the legislature to do an act, it includes the power of determining conclusively whether its exercise is expedient in the particular case. *Leggett v. Hunter* did not assume to determine that the legislature had power to authorize the sale of the private property of adults without the consent of the owner, other than for public use, however advantageous it might be.

"*In the Matter of the Petition of the Trustees P. E. School, &c.,*

31 N. Y. 574, it was held that the legislature had power to authorize the sale of land for the payment of taxes and assessments thereon, and *Powers v. Bergen* was referred to as correctly decided; referring to that case, Denio, C. J., says: It has been decided by this court that the legislature has no constitutional power to cause land to be sold for the purpose of disentangling an estate, where the parties entitled to future estates are under no disability to act for themselves, though it is fully admitted that it may be done when the rights of infants, lunatics, etc., are concerned. This must be regarded as the settled law of the State, although in conflict with *Solier v. Mass. General Hospital*, 3 Cushing, 483.

"The cases cited, holding that the legislature have power to change existing joint tenancies into tenancies in common, and thereby destroy the right of survivorship, have no bearing upon the question under consideration. *Bombaugh v. Bombaugh*, 11 Sergeant & Rawle, 191; *Miller v. Miller*, 16 Mass. 61; *Holbrook v. Finney*, 4 Id. 586. *Jacobson v. Babcock*, 16 N. Y. 246, holds the Act (chap. 327, Laws of 1855), providing for the sale of land for the payment of taxes, etc., constitutional and valid. *Rockwell v. Nearing*, 35 N. Y. 302, *Campbell v. Evans*, 45 N. Y. 356, and *Happy v. Mosher*, relate to other questions, and afford no light upon the present case. *Striker v. Mott*, 28 N. Y. 82, is cited by counsel to show that the heirs of the children of the testator's brother, John, have no such interest in the lands as can be alienated by them. That case arose upon a will which took effect in 1819, before the passage of the Revised Statutes; sections 9, 10, 13, 14, 16, 25, and other sections of article 1, 1 Stat. at Large, 670, show that these heirs had an estate in expectancy, contingent upon the death of Mrs. Brevoort without issue surviving; section 35 makes such estate descendible, devisable, and alienable, in the same manner as estates in possession.

"It is insisted by the counsel for the respondent that the Act in question should be sustained, for the reason that some of the heirs are infants, and that the legislature has the power to authorize the sale of the interests of these infants. But this does not confer the power to authorize a sale of the interests of the adults without their consent.

"It is further insisted that although the legislature may not have the power to authorize the sale of an estate in possession, or a vested estate in expectancy of an adult without his consent, yet it can authorize the sale of a contingent estate in expectancy. I can see no reason for the distinction. An owner *sui juris* is equally competent to determine and manage for himself in the one case as in the other. The foundation of the power of the legislature to act in behalf of any owner is the want of capacity to act for himself, and this reason no more extends to the case of a contingent than to a vested expectant estate. The question as to whether the interests are vested or contingent is not material and will not be discussed.

"It is obvious that the fact that Henry Brevoort being a party can

have no bearing upon the power of the legislature to sell without their consent the interest of the heirs of the testator's brother John. For this purpose he no more represents, and has no more power to affect their rights than a stranger to the title. He may bind his own rights by his acts but not those of others. My conclusion is that the deed tendered would not have conveyed to the appellants an indefeasible title in fee to the premises purchased by them.

"The judgment must therefore be reversed and judgment given for the defendants upon the demurrer to the complaint."

All concur.

RAPALLO, J., expresses no opinion as to power of legislature to cut off contingent remainder-men or persons not in being.

*Judgment accordingly.*¹

Q40

STARR v. PEASE.

CONNECTICUT SUPREME COURT OF ERRORS. 1831

[8 Conn. 540.]

THIS was an action of ejectment; to which the general issue was pleaded.

The case was as follows. In the year 1799, the plaintiff became the wife of John L. Lewis. In 1820, George Starr, the father of the plaintiff, died, seised of the demanded premises; and immediately thereafter, the fee thereof was vested in the plaintiff, as his heir, and the right of possession in Lewis, her husband. In 1826, the premises were taken by execution, in favor of Pease, one of the defendants, against Lewis; and his right therein became vested in Pease, who, with the other defendants, on the 14th of May, 1820, ousted the plaintiff, and took possession. Lewis never had any child by this marriage, and is still living.

In May, 1827, the plaintiff preferred her petition to the General Assembly, for a divorce, which was granted; and the following Act or decree was passed: "Upon the petition of Martha M. Lewis, representing to this Assembly that she was lawfully married to John L. Lewis, on the 23rd day of September, 1799; and that, on or about the 15th day of January, 1826, the said John L. Lewis indulged such criminal intimacies with one Nancy B. Jones as amounted to adultery, as nearly as could be, without the actual perpetration of the crime; and praying for a divorce; as per petition on file: And the said allegation, after hearing of the petitioner and said John L. Lewis, with their witnesses and counsel, being found true:

"Resolved by this Assembly, that the said Martha L. Lewis be, and

¹ See Cooley, Const. Lim. (6th ed.) 115-123. As to express prohibitions in some constitutions, *Id.*, 116, note 1. — ED.

exercised the power in Conn. and even after a general law had been passed regulating the subject of divorce nevertheless the legislature had frequently interfered and passed special acts of divorce. The power was

In the trial of an ejectment the plaintiff was a divorcee had been granted by the legislature of Conn. It was objected that the legislature had no power to dissolve the marriage contract. Held, that the legislature had the power after ex-

and to declare the law void now would result in
appalling consequences to many.

she hereby is, divorced from her said husband, the said John L. Lewis;
and is hereby released and absolved from all obligations, by virtue of
said marriage."

The case was reserved for the advice of this court, upon the question,
whether the plaintiff was entitled to a recovery; and if so, to what
period the rents and profits should be computed, in the assessment of
damages.

Sherman and Barnes, for the plaintiff.

N. Smith and Storrs, for the defendant.

DAGGETT, J. . . . It is said, however, that if a State legislature were
authorized to make a law giving power to some tribunal to grant
divorces, still they cannot, by a sovereign Act, dissolve this contract.
This, I apprehend, applies only to the fitness of the exercise of the
power in question, and not to the constitutional right. It will be
exceedingly difficult to establish that Act to be a violation of the Con-
stitution of the United States, when done by the legislature itself,
which would not be so, if done by a court, in obedience to law. In the
case of *Culder & ux. v. Bull & ux.*, 3 Dall. 386, the Supreme Court of
the United States decided, that a resolution or law of the Legislature
of Connecticut establishing a will, was not a violation of the Constitu-
tion of the United States.

A further objection is urged against this Act, *viz.*, that by the new
Constitution of 1818, there is an entire separation of the legislative and
judicial departments, and that the legislature can now pass no Act or
resolution, not clearly warranted by that Constitution; that the Con-
stitution is a grant of power, and not a limitation of powers already
possessed; and in short, that there is no reserved power in the legis-
lature since the adoption of this Constitution. Precisely the opposite
of this is true. From the settlement of the State there have been cer-
tain fundamental rules, by which power has been exercised. These
rules were embodied in an instrument, called, by some, a constitution,
—by others, a charter. All agree, that it was the first Constitution
ever made in Connecticut, and made too, by the people themselves.¹ It
gave very extensive powers to the legislature, and left too much (for
it left everything almost) to their will. The Constitution of 1818 pro-
fessed to, and, in fact, did, limit that will. It adopted certain general
principles, by a preamble, called a *declaration of rights*; provided for
the election and appointment of certain organs of the government, such
as the legislative, executive, and judicial departments; and imposed
upon them certain restraints. It found the State sovereign and inde-
pendent, with a legislative power capable of making all laws necessary
for the good of the people, not forbidden by the Constitution of the
United States, nor opposed to the sound maxims of legislation; and it

¹ There appears to be a confusing double reference here, — to the "Fundamental
Orders" of 1638-1639 (1 Poore's Charters, 249), and to the Charter of Charles II. (Ib.
252). — Ed.

the power.
The mere allotment of power
to legislative, executive, and judicial, does not deprive the

then to grant legislative divorces. After the Court
of Mass. was adopted the legislature frequently.

left them in the same condition, except so far as limitations were provided.¹

There is now, and has been, a law in force, on the subject of divorces. This law was passed one hundred and thirty years ago. It provides for divorces *a vinculo matrimonii*, in four cases, viz., adultery, fraudulent contract, wilful desertion, and seven years' absence, unheard of. The law has remained in substance the same as it was, when enacted, in 1667. During all this period, the legislature has interfered, like the Parliament of Great Britain, and passed special Acts of divorce *a vinculo matrimonii*; and, at almost every session since the Constitution of the United States went into operation, now forty-two years, and for the thirteen years of the existence of the Constitution of Connecticut, such Acts have been, in multiplied cases, passed, and sanctioned, by the constituted authorities of our State.

We are not at liberty to inquire into the wisdom of our existing law on this subject; nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the Act under consideration. The power is not prohibited, either by the Constitution of the United States, or by that of this State. In view of the appalling consequences of declaring the general law of the State, or the repeated Acts of our Legislature, unconstitutional and void, — consequences easily conceived, but not easily expressed, — such as bastardizing the issue and subjecting the parties to punishment for adultery, — the court should come to the result only on a solemn conviction that their oaths of office and these Constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the Act void.

Another question was reserved, that is, shall damages be recovered to the date of the writ, or to the rendition of the judgment? It is understood, that different rules have prevailed on this point. I think it most consonant to principle, that damages should be given only to the date of the writ.

I would therefore advise the Superior Court, that judgment be entered up for the plaintiff, with damages to the date of the writ.

HOSMER, CH. J., and BISSELL, J., were of the same opinion.

PETERS, J., said he could not give an unqualified concurrence. Upon general principles, he had no doubt, that the Act of Divorce in this case, was repugnant to the Constitution of the United States, as impairing the obligation of a contract; and that it was void, under the Constitution of this State, as an assumption of judicial power by the legislature. But in view of the decisions in analogous cases and of the appalling consequences of nullifying all legislative Acts of Divorce, he should acquiesce in the opinion of the court. On the point of damages he concurred without hesitation.

¹ See *Pratt v. Allen*, 13 Conn. 124, where Williams, J., quotes and sanctions these doctrines; and see *Trustees of Bishops' Fund v. Rider*, 13 Conn. 87, for the general subject of laws impairing contracts.

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trials.
Finally
held to be
a judicial
power.
New trials
were granted
by the
legislature
of Pa. down
to the middle
of the
present
century.

WILLIAMS, J., having been retained as counsel for Lewis, on the plaintiff's application for the Act of Divorce, declined giving any opinion as to the validity of that Act. He concurred as to the damages.

*Judgment to be given for the plaintiff.*¹

WILKINS v. JEWETT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[139 Mass. 29.]

MORTON, C. J. This is an action to recover one half the cost of a party wall. In 1873, the plaintiff made an agreement with one Matthews, who was then the owner of the equity of redemption of the defendant's land, that the plaintiff might place one half of the division wall of his house on the defendant's lot; and that Matthews would pay one half of the cost of the wall when he made use of it.

The defendant's title is under the foreclosure of a mortgage existing at the time this agreement was made. The mortgagee was not a party to the agreement, and it is not contended that the defendant is bound by it. But the plaintiff contends that the defendant is liable by virtue of the Prov. St. of 1692-93 (5 W. & M.) c. 13, entitled, "An Act for building with stone or brick in the town of Boston, and preventing fire." 1 Prov. Laws (State ed.) 42. This statute provided, in § 2, that "every person building as aforesaid with brick or stone shall have liberty to set half his partition wall in his neighbor's ground, so that he leave toothing in the corners of such walls for his neighbor to adjoin unto, who, when he shall build, such neighbor adjoining shall pay for one half of the said partition wall, so far as it shall be built against. And in case of any difference arising, the selectmen shall have power to appoint meet persons to value the same or lay out the line between such neighbors."

We are of opinion that this provision of the Provincial Statutes was never in force in the Commonwealth of Massachusetts. The Constitution continued in force all laws adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, until altered or repealed by the legislature, "such parts only excepted as are repugnant to the rights and liberties contained in this Constitution." Const. Mass. c. 6, art. 6.

The provision in question undertakes to deal with private property, and to authorize one man to appropriate and use the property of another without his consent. ... It assumes to take private property with-

¹ See 1 Bish. Mar. & Div. (6th ed.) ss. 685, 686; Cooley, Const. Lim. (6th ed.) 128-133. The topic here considered is covered in several States by express constitutional provisions. — Ep.

The case could not be sustained on the ground of error done. But it could be sustained on the same ground that Haverhill & Amherst Co. was supported.

plaintiff's right to recover against the party which built. The agreement was made with the owner of the land. The title by a closed mortgage. The provincial statutes are not in force. The legislature had no right to pass laws which would be unconstitutional. The plaintiff is entitled to recover for 1/2 of the party wall.

for the advantage of the public welfare to have party walls

compensation. would the law have been good on the doctrine of the case. Haythinks the decision good.

CHAP. V.]

TURNER v. NYE.

893

A man gets an easement in the other half of the wall. Is that expropriation? In thick settled communities it is advisable to allow party walls. It further public interest that this should be done. Not an expropriation of power.

out due process of law, and without compensation. It is repugnant to the fundamental principles declared in the Declaration of Rights, that the property of the subject shall not be appropriated, even for public use, without paying him a reasonable compensation therefor, and that he shall not be deprived of his property but by the judgment of his peers, or the law of the land; and that, in all controversies concerning property, he shall have a right to trial by jury. Declaration of Rights, arts. 10, 12, 15. *Morse v. Stocker*, 1 Allen, 150. *Forster v. Forster*, 129 Mass. 559.

Undoubtedly, the authority of the legislature, in the exercise of the police power, is very broad. This power is founded upon the principle that any man may be reasonably restrained in the use of his property so as not to injure others. *Watertown v. Mayo*, 109 Mass. 315, 318. But it does not justify authorizing one man to appropriate and use the property of another without his consent and without adequate compensation.

It is a significant fact, that, since the adoption of the Constitution, no trace can be found of any legislative or judicial sanction of the provisions of the Provincial statute upon which the plaintiff relies. We think it has been regarded as repugnant to the principles of the Constitution, and as of no force. It follows that the plaintiff cannot maintain this action.

Exceptions overruled.

J. D. Thomson, for the plaintiff, cited *Quinn v. Morse*, 130 Mass. 317, 321.

R. D. Smith and *G. W. Estabrook*, for the defendant.

TURNER v. NYE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[154 Mass. 579.]

Bill in equity to prevent deft. from maintaining a dam across a creek and from flowing pelfs land

BILL in equity, filed in the Superior Court on September 5, 1889, to prevent the defendant from maintaining a dam across a creek flowing into Cataumet Harbor in Falmouth, in the county of Barnstable, and from flowing the plaintiffs' land. Hearing before MASON, J., who ordered the bill to be dismissed, and, after an appeal had been taken by the plaintiffs to this court, made the following report of the facts.

The plaintiffs were the owners of about three fourths of an acre of marsh land adjoining the creek above referred to; and the defendant had built the dam across the creek in question, under the provision of the St. of 1889, c. 383,¹ and by the license of the Board of Harbor and

¹ This statute, entitled "An Act to authorize the Flowage of Land for the Purposes of Fish Culture," was approved on May 28, 1889, and is as follows: "Any owner or lessee of lands or flats situated in the county of Barnstable, appropriated or which he desires to appropriate to the culture of useful fishes, may erect and maintain a dam

Pelfs. were owners of about 3/4 an acre of land adjoining creek and deft. with a dam over flowing the land and about 60 ft of his own for the purpose

Apore of raising a pond for the cultivation of useful fishes. Pelfs. contended that the statute authorizing this sort of thing was unconstitutional as it authorized the taking of private property for a public use in its nature. It held the

what was enacted under that provision of the state const. which gave the legislature the right to establish all manner of reasonable laws as that body should judge for the good and welfare of the Commonwealth. [CHAP. V.]

Land Commissioners, so as to flow about sixty acres of his own land and that of the plaintiffs, so that they were deprived of the use of it. The dam was partially constructed, and the plaintiffs' land appreciably flooded, but no substantial damage was done before the passage of that statute.

This dam was erected and is maintained for the purpose of creating and raising a pond for the culture of useful fishes, and the pond raised by the dam is well stocked with trout. The immediate purpose or intention of the defendant and those interested with him was not to perform a public service, but to engage in the culture of useful fishes for their own personal pleasure and profit, and the pleasure and profit of particular persons to whom they should sell rights to fish in the pond. It was not their purpose to supply the market with such fishes, nor to supply them to the public by any means, direct or indirect. The land of the plaintiffs had small market value for any use to which it could be applied other than that for which it is now used by means of the defendant's dam. There was at the time of the passage of the Act, and is now, much land in Barnstable County similarly situated, having small market value for any purpose to which it can be applied by its separate owners, which would be enhanced in value if it were shown by successful experiment that such land could be profitably used for the cultivation of useful fishes under the powers conferred by the Act.

The case was argued at the bar in March, 1891, and afterwards, in September, was submitted on the briefs to all the judges.

A. M. Goodspeed, for the plaintiffs.

J. M. Hall, for the defendant.

MORTON, J. {The plaintiffs do not rely upon the fact that the dam was partially constructed by the defendant before the passage of the St. of 1889, c. 383.} The plaintiffs could not avail themselves of that fact in this suit. If the dam is maintainable under that statute, the plaintiffs would not be entitled to its abatement although it was partly erected without right. Ware v. Regent's Canal Co., 3 DeG. & J. 212. And if they are entitled to damages for the technical violation of their rights, their remedy is at law. Washburn v. Miller, 117 Mass. 376. Nor do they rely upon the point suggested by the defendant, that the operation of the Act is confined, as it clearly may be, to Barnstable County. Cooley, Const. Lim. 390.

The plaintiffs contend that the St. of 1889, c. 383, under which the court found that the dam was completed and is maintained by the defendant, is unconstitutional, because, first, it purports to authorize the

across any stream for the purpose of creating or raising a pond for such fish culture, upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes, so far as the same are properly applicable in such cases. provided, however, that nothing herein contained shall authorize the erection or maintenance of a dam across any navigable stream within said county without a license obtained therefor from the Board of Harbor and Land Commissioners, in accordance with and subject to the provisions of chapter nineteen of the Public Statutes."

sufficient to justify the action of the legislature.
not held unconstitutional.
filed 2. J. dissents.

taking of private property for a use which is not public in its nature, and secondly, if the statute is constitutional, the defendant has not brought himself within it.

But in regard to the first point we think the plaintiffs misapprehend the constitutional provision which applies to the Act in question. The statute was not an exercise on the part of the legislature of the right of eminent domain, but was enacted under the provision which gives it power to "make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, . . . so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." Const. Mass., Part 2, c. 1, art. 4. It is upon this provision that the Mill Acts have been placed finally in this State, after what appear at times to have been somewhat conflicting views. *Boston & Roxbury Mill Co. v. Newman*, 12 Pick. 467; *Murdock v. Stickney*, 8 Cush. 113; *Hazen v. Essex Co.*, 12 Cush. 475; *Talbot v. Hudson*, 16 Gray, 417; *Lowell v. Boston*, 111 Mass. 454. It may be doubted whether, as new legislation, they could be sustained as an exercise of the right of eminent domain. *Murdock v. Stickney*, 8 Cush. 113; *Lowell v. Boston*, 111 Mass. 454; *Cooley*, Const. Lim. 534; *Jordan v. Woodward*, 40 Maine, 317.

Upon this provision also stand the Cranberry Act, so called (St. 1866, c. 206); the Act in regard to draining meadows, swamps, marshes, beaches, and low lands, with its authority to commissioners to open the floodgates of a mill, or to erect a temporary dam on the lands of another person, and assess the damages upon the proprietors (Pub. Sts. c. 189; see *Wurts v. Hoagland*, 114 U. S. 606); the Act in regard to proprietors of wharves, general fields, and lands lying in common, with the control which it gives to a certain proportion in number and interest over the property of the rest (Pub. Sts. c. 111); and the Act in regard to partition, by which one co-tenant may be compelled to take money instead of land, or to give up for a time the occupation and enjoyment to another. Pub. Sts. c. 178. The Mill Acts, and these and other like statutes (of which various illustrations might be given), rest upon the principle that property may be so situated or of such a character that the absolute right of the individual owner to a certain extent must yield to or be modified by corresponding rights on the part of other owners, or by what is deemed on the whole to be for the public welfare. See *Commonwealth v. Tewksbury*, 11 Met. 55; *Commonwealth v. Alger*, 7 Cush. 53; *Denham v. County Commissioners*, 108 Mass. 202; *Wurts v. Hoagland*, 114 U. S. 606.

The provision above quoted does not authorize the legislature to take property from one person and give it to another, nor to take private property for public uses without compensation, nor wantonly to interfere with private rights. These are always to be carefully guarded and protected. But of necessity cases will arise where there will or

and so there would be no taking of a permanent
sacrament But sup. the 60 acres belonged to p. & the
3/4 to the def. Would not the purpose of the act require
that the dam be built in a certain place? Is so that the

Assuming there was a taking of property was the taking for a public purpose? It is for the legislature to determine.

may be a conflict of interests in the use or disposition of property, and questions may and will come up affecting the public welfare in regard to the use which shall or shall not be permitted of certain property.

It is for the legislature in such instances, under the power thus conferred upon it, and with due regard to private rights, to enact the necessary laws. It is for the public good that swamps and waste lands should be reclaimed and made productive. It is also for the public good that streams should be used to operate mills, to raise cranberries, and to cultivate useful fishes. If private rights appear to some extent to be invaded, that is inseparable from the nature of the use authorized, without which the streams could not be advantageously or profitably used, and compensation is provided for any injury that may be done. The character of the property and the resulting general good are deemed sufficient to justify the action of the legislature.

It is doubtful, however, whether any property of the plaintiff is taken or any of his rights are invaded. The statute in question authorizes the erection and maintenance of a dam across any stream for the purpose of creating or raising a pond for the culture of useful fishes. It is to be erected "upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes so far as the same are properly applicable in such cases." The chapter referred to is what is known as the Mill Act. Under that it has been held that the right to erect and maintain a dam to raise water for working a mill does not give to the mill-owner any right in the land flowed, or take away any right from the land-owner. The latter may embank his land and thus stop any flowage of it, or, if he chooses, he may collect of the mill-owner damages in gross or annually for the flowage. Until the land-owner manifests his election to claim damages, he cannot be compelled by the mill-owner to submit his land to be flowed, and until then the only right which the mill-owner has as between himself and the land-owner is to maintain his dam without liability to the land-owner for damages in an action at law. ¶ While the land-owner may protect his land from flowage, he cannot, of course, wantonly interfere with the right which the statute gives to the mill-owner to maintain his dam. } *Williams v. Nelson*, 23 Pick. 141; *Murdock v. Stickney*, 8 Cush. 113; *Storm v. Manchaug Co.*, 13 Allen, 10; *Paine v. Woods*, 108 Mass. 160; *Lowell v. Boston*, 111 Mass. 454; *Heed v. Amoskeag Manuf. Co.*, 113 U. S. 9.

There would seem to be nothing in the purpose for which the right is given to erect and maintain a dam to create a pond for the culture of useful fishes that should give to the party erecting or maintaining such a dam any greater rights over the lands flowed by it than a mill-owner would have over lands flowed by the dam maintained by him. Without anything more, we should be slow to infer from a power to maintain a dam to create a pond for the culture of useful fishes any greater rights over lands flowed than from a power to maintain a dam to raise water for working a mill.

It appears from the facts found in the present case that the defendant's dam flows about sixty acres, all of which, with the exception of about three-fourths of an acre belonging to the plaintiffs, is owned by the defendant. It is also found that the land of the plaintiffs was of small market value for any other use to which it could be applied, and that there is "much land in Barnstable County similarly situated, having small market value for any purpose to which it can be applied by its separate owners, which would be enhanced in value if it were shown by successful experiment that such land could be profitably used for the cultivation of useful fishes under the powers conferred by" the Act in question. In view of these facts, and for the reasons above stated, we think that the claim of the plaintiffs that the Act is unconstitutional cannot be maintained. We come to this conclusion the more readily, because a contrary result would oblige us, we fear, to hold, if the question were directly presented to us, that the Cranberry Act, under which a large and profitable industry has grown up, was also unconstitutional. Although several cases under that Act have been before this court, no doubt as to its constitutionality seems to have been suggested. *Bearse v. Perry*, 117 Mass. 211; *Hinckley v. Nickerson*, 117 Mass. 213; *Blackwell v. Phinney*, 126 Mass. 458; *Howes v. Grush*, 131 Mass. 207.

The plaintiffs further contend, that, if the Act is constitutional, the defendant has not brought himself within its scope, because it does not appear that any direct or positive benefit will be derived by the public from the defendant's acts, and because the dam has been erected and will be maintained by him wholly for his own personal pleasure, profit and advantage. But the court has found that "the dam was erected and is maintained for the purpose of creating and raising a pond for the culture of useful fishes, and the pond raised by the dam is well stocked with trout." (This finding brings the case within the exact words of the statute.) It is not necessary that it should also appear that the object of the defendant was to benefit the public. The legislature deemed the culture of useful fishes for any purpose beneficial, and passed this statute, as it did the Mill Acts, for the purpose of enabling a lessee or owner of lands or flats to raise a dam across a stream so as to engage in that occupation and use the stream without the liability to constant lawsuits from persons whose lands might be flowed. No doubt the defendant's object is his own personal pleasure, profit and advantage. (But if the enterprise is successful, the public will be benefited by the introduction and building up of a new and profitable industry, and lands now of little value and not available for any other use will be made valuable. We think this contention must also be overruled.

The result is that, in the opinion of a majority of the court, the decree appealed from must be *Affirmed.*

1889, c. 383, briefly stated, are as follows. The purpose of the statute is not public. Cultivating fish for one's private use no more concerns the public than cultivating corn or other articles of food. The taking for such a purpose of the land of another by overflowing it cannot be justified as an exercise of the right of eminent domain. Notwithstanding what has been said in some of our decisions, overflowing a person's land without his consent is a taking of property while the overflow continues, and is a tort which would be enjoined unless the statutes authorized it. The Mill Acts were originally sustained on the ground that the erection of water-mills was for the public benefit, and this was strictly true of grist-mills and saw-mills, if the public had the right to have their grain ground and their logs sawed at the mills. The Acts, however, extended to mills of all kinds, in most of which the interests of the public were less direct; still, the erection of water-mills, when water was the only available source of power, was always of public concern sufficient to justify the damming of streams, if compensation were paid to the persons whose lands were overflowed. Mill Acts were in force long before the adoption of the Constitution, and it could not properly be held that it was the intention of that instrument to render them void. But the damming of the waters of a running stream, so that the lands of the upper proprietors are overflowed, is something more than the reasonable use of the water, which every proprietor is entitled to make, as it runs through his land, without paying any compensation to the upper or lower proprietors. It has never been supposed that the Mill Acts would be sustained if they contained no provision for compensation to the persons whose lands were flowed. As was said in *Isele v. Arlington Five Cents Savings Bank*, 135 Mass. 142, 144, "The right to flow water back upon the land of another is not the less an easement in its nature because such other may lawfully wall or dike against it. Such right on his part diminishes the extent of the easement, but does not alter its character." *Kenison v. Arlington*, 144 Mass. 456.

The statute in question cannot be sustained on the ground that it authorizes the improvement of property of different owners for the common benefit of the owners or for the public benefit, or on the ground that it authorizes the improvement of property which otherwise would be practically useless. It is not confined to useless or swampy lands, or to lands of any particular description. The constitutionality of the statute must be determined by its meaning, and not by the special facts of the present case. It is possible under the statute that any owner or lessee of lands or flats situated in Barnstable County for the purpose of making a fish-pond for his own private use and pleasure, may overflow the greater part of the arable land in the county, with the buildings upon it. None of the precedents cited seem to me to go as far as the opinion of the court in this case, and I am compelled to think the statute unconstitutional.

COMMONWEALTH v. GILBERT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893.

[160 Mass. 157.]

REPORT from Superior Court, Plymouth County; EDGAR J. SHERMAN, JUDGE.

Walter L. Gilbert was convicted of unlawfully selling a trout, and the case was reported for the determination of the Supreme Judicial Court. Verdict ordered to stand.

The indictment charged that defendant, on the 29th day of March in the year 1893, did have in his possession, and did offer and expose for sale, and did sell, one trout, said trout having been taken in this Commonwealth, and not then and there being alive. To this indictment defendant pleaded not guilty. It was admitted, however, that the defendant did, on the day charged in the complaint, sell one dead trout, as therein alleged. The defendant claimed that said trout was one which had been artificially raised, propagated, and maintained by him, and offered to prove the facts as to the method of hatching, raising, and maintaining said trout, which also applied to all other trout owned by him, claiming that, if he did prove these facts to the satisfaction of the jury, he was entitled to an acquittal, on the ground that the statute against selling trout between certain dates applied only to wild trout, or trout that are hatched and grow in a state of nature, without artificial aid in propagating and maintaining them. The Commonwealth did not contest the truth of the facts offered to be proved by the defendant, but claimed that such evidence would furnish no defence against the indictment, and was inadmissible for that purpose. The presiding judge so ruled, and excluded the evidence. The defendant also asked the court to rule that the statutes of this Commonwealth provide no penalty against a person for having in his possession and offering and exposing for sale and selling dead brook trout artificially cultivated, propagated, and maintained by him in this Commonwealth. If the statutes of this Commonwealth impose any penalty upon the defendant for having in his possession and offering and exposing for sale and selling dead brook trout which were kept and confined in artificial ponds upon his own premises, and which were artificially cultivated, propagated, and maintained in the manner the defendant offered to prove that his were confined, cultivated, propagated, and maintained, then the statute, so far as it applies or relates to such trout, is unconstitutional. The court refused to give the rulings as requested.

Robert O. Harris, for the Commonwealth. T. E. Grover, for defendant.

ALLEN, J. There are two questions in this case, namely, whether the defendant's act was within the true meaning of the statute forbidding the sale of trout; and, if so, whether the statute is constitutional.

the passing of reasonable laws for the good and welfare of the commonwealth. Such laws are not to be held unreasonable because owners of property may thereby to some extent be re-

Def't was convicted of unlawfully selling a trout. Evidence

that the dead trout was one which had been artificially raised

and propagated by him, which was excluded at the trial.

Def't. called evidence that the female trout imposed a penalty extended to include fish artificially propagated and maintained, that it must be unconstitutional.

He said it did include the sale of such fish and it is constitutional.

The right of the Legislature to regulate the game from the provisions in the state Constitution empowers

during the close season to furnish the sale of all dead trout in order to make the protection of the trout more effectual.

1. The defendant contends that the penalty imposed by Pub. St. c. 91, § 53, for selling trout, does not extend to the sale of trout which have been artificially propagated and maintained. Whatever force this contention might have if section 53 stood alone, a reference to other sections of the same chapter, and to the history of this legislation, makes it clear that such trout are not exempted. . . . The object of all these statutes was to protect and preserve the trout. The same statute which first forbade their sale also contained the provisions upon which the present statute is founded, to encourage their artificial propagation and maintenance. In order to make the protection of the trout more effectual, it was deemed necessary by the legislature to punish the sale, during the close season, of all trout except those which are alive. This was probably on account of the difficulty in distinguishing between trout which had been artificially propagated or maintained and other trout. On the construction contended for by the defendant, the law could not be so well enforced. In view of the provisions of section 26, it seems to us plain that the penalty imposed by section 53 extends to artificially propagated trout.

2. Nor have we any doubt that the statute is constitutional. The importance of preserving from extinction or undue depletion the trout and other useful fishes in the waters of the Commonwealth has been recognized and illustrated in many familiar statutes and decisions from an early time. Such protection has always been deemed to be for "the good and welfare of this Commonwealth," and the legislature may pass reasonable laws to promote it. Such laws are not to be held unreasonable because owners of property may thereby to some extent be restricted in its use. It has often been declared that all property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community. Many illustrations might be cited where such restrictions on the use of property have been held valid. But the cases are familiar. The limitation is that the restrictions must not be unreasonable. The legislature may "make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth." Const. c. 1, § 1, art. 4. The legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their own lands. The statute under consideration falls within this power. *Com. v. Look*, 108 Mass. 452; *Com. v. Alger*, 7 Cush. 53, 84, 85; *Com. v. Tewksbury*, 11 Mete. (Mass.) 55, 57; *Cole v. Eastham*, 133 Mass. 65; *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390; *Blair v. Forehand*, 100 Mass. 136; *Phelps v. Racey*, 60 N. Y. 10.

Verdict to stand.

OPINION OF THE JUSTICES

OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1890.

[150 Mass. 592.]

THE following order was adopted by the House of Representatives on May 22, 1890, and thereupon transmitted to the Justices of the Supreme Judicial Court, who, on May 27, 1890, returned the opinion which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions of law:—

First. Is it within the constitutional power of the legislature to enact a law conferring upon cities and towns within this Commonwealth the power to manufacture gas or electric light for use in the public streets and buildings of such cities and towns?

Second. Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to manufacture gas or electric light for the purpose of selling the same to its own citizens?

And be it further ordered, That the Justices of the Supreme Judicial Court be informed that the foregoing questions are propounded with a view to further legislation upon the subjects therein referred to, and that, for their more particular information, a copy of House Document No. 436, being a bill now pending before this House, and upon the subject-matter of which the foregoing questions are propounded, be transmitted to the justices.

To the Honorable House of Representatives of the Commonwealth of Massachusetts:

We received on May 24, 1890, your order of May 22, 1890, a copy of which is annexed, and we respectfully submit the following opinion.

In considering the questions asked, we assume that the power to be conferred is not merely a power to receive and use property given in trust for the purposes named, but is a power to raise money by taxation, and by means of it to construct and maintain works for the manufacture and distribution of gas or electricity, to be used by the municipalities for lighting the public streets and buildings, and by the inhabitants for lighting the land and buildings which are their private property.

We also assume that the gas or electricity to be furnished to the inhabitants for their private use is to be paid for by them at rates to be established, which shall be deemed sufficient to reimburse to the cities and towns the reasonable cost of what is furnished, and that all the inhabitants of a city or town are to have the same or similar rights to be supplied with gas or electricity, so far as is reasonably practicable, and the capacity and extent of the works, which it is deemed expedient

*These advisory
opinions
are mere
opinions
and have
not the
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to maintain, will permit. Whether cities and towns can be authorized to give gas or electricity to their inhabitants, or to sell either to them, at varying and disproportionate prices, selecting their customers, selling to some and arbitrarily refusing to sell to others, are questions which it is not necessary to consider.

By the Constitution, full power and authority are given to the General Court to make "all manner of wholesome and reasonable orders, laws, statutes, and ordinances," not repugnant to the Constitution, which "they shall judge to be for the good and welfare of this Commonwealth," etc., and "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and persons resident, and estates lying within the said Commonwealth, . . . for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof," etc. Const. Mass., Part II. chap. i. sect. i. art. iv.

The extent of the right of taxation is not necessarily to be measured by that of the right of eminent domain, but the rights are analogous. Private property can be taken without the consent of the owner only for public uses, and the owner must be paid full compensation therefor; otherwise, he would contribute more than his proportional share toward the public expenses. By taxation the inhabitants are compelled to part with their property, but the taxation must be proportional and reasonable, and for public purposes. Taxes may be imposed upon all the inhabitants of the State for general public purposes, or upon the inhabitants of defined localities for local purposes, and when distinct private benefits are received from public works special assessments may be laid upon individuals.

We have no doubt that, if the furnishing of gas and electricity for illuminating purposes is a public service, the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants, and that such cities and towns can be authorized to impose taxes for this purpose upon their inhabitants, and to establish reasonable rates which the inhabitants who use the gas or electricity can be compelled to pay. The fundamental question is whether the manufacture and distribution of gas or electricity to be used by cities and towns for illuminating purposes is a public service.

The maintenance of public streets and buildings is a public service, and it may be reasonably necessary to light them in order that the greatest public benefit may be obtained from using them. To say nothing of the usefulness of lighting streets as a means of promoting order and of affording protection to persons and property, the common convenience of the inhabitants may require that they be lighted. Cities and thickly settled towns have for a long time been accustomed to light their public buildings and some of their streets at the public expense. If the streets and public buildings are to be lighted, the means is a

matter of expediency. If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate means which it may think expedient. As a question of constitutional power, we cannot distinguish the right to authorize cities and towns to buy gas or electricity for their use, from the right to authorize them to manufacture it for their use. We therefore answer the first question in the affirmative.

The second question is one of more difficulty. It is impossible to define with entire accuracy all the characteristics which distinguish a public service and a public use from services and uses which are private. The subject has been considered many times in the opinions of the court of which we are now the justices, and *Lowell v. Boston*, 111 Mass. 454, is a leading case. It is there said that "an appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power;" that "the promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object;" and that the appropriation of property for turnpikes and railroads "can only be justified by the public service thereby secured in the increased facilities for transportation of freight and passengers, of which the whole community may rightfully avail itself." It is said that the essential point is that a public service or use affects the inhabitants "as a community, and not merely as individuals."

It was early decided that "the prevention of damage by fire is one of those objects affecting the interest of the inhabitants generally, and clearly within the scope of municipal authority." *Allen v. Taunton*, 19 Pick. 485. Although the property to be protected is private property, the need of protection is felt by every owner in the city or town; the property of one may be endangered by the burning of that of another; efficient means of protecting his property cannot well be furnished by every inhabitant; and there is a necessity of common action which makes the expenditure of money for the purpose properly a municipal expense.

The maintenance of sewers and drains is a public service. One object is the preservation of the public health; but apart from this they are of great convenience to the inhabitants whose estates can be drained by them. It is impracticable for every owner of land in cities and towns to construct and maintain sewers and drains exclusively on his own account; they cannot ordinarily be constructed over any considerable territory without using the public ways, or exercising the right of eminent domain; they are therefore regarded as of common convenience, and are constructed at the public expense.

The furnishing of water for cities and towns for domestic use affords perhaps the nearest analogy to the subject we are considering. It was long ago declared that "the supply of a large number of inhabitants

with pure water is a public purpose." *Lumbard v. Stearns*, 4 Cush. 60. The statutes are well known which authorize cities and towns to maintain water-works for supplying their inhabitants with water, and the constitutionality of these statutes has not been doubted. Water cannot ordinarily be supplied to a large city or town from ponds or streams without the exercise of the right of eminent domain and the use of the public ways; every inhabitant needs water, and often the only practicable method of obtaining it is by the agency of corporations or of the municipality. The land for the public ways having been taken for a public use, it may be subjected to other public uses, but it cannot be subjected to strictly private uses without the consent of the owners of the fee when the fee remains in the abutters. There is therefore often a necessity of having water, common to the inhabitants of a community, which cannot well be met except by the exercise of public rights, and therefore the furnishing of water has been considered a public service.

In the case of water, as in that of sewers and drains, a portion of the service is exclusively public, and the benefit to individuals cannot be separately estimated from that of the community; but a part of the service is rendered to individuals, and the benefit of this can be separately estimated. The inhabitants are therefore required to pay for the water furnished for their private use, and special assessments for the use of sewers and drains are laid upon estates specially benefited; and for the same reasons, while in laying out highways the expense is public, betterment assessments may be laid upon the owners of lands specially benefited.

Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain.

It is not necessarily an objection to a public work maintained by a city or town, that it incidentally benefits some individuals more than others, or that from the place of residence or for other reasons every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But in general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to

municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them.

If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants we think that the legislature can confer the power. We therefore answer the second question in the affirmative.

We notice that the bill,¹ a copy of which was enclosed with your order, relates to the manufacture and distribution of gas or electricity, not only for furnishing light, but also for furnishing heat and power. We have not considered whether the furnishing of gas or electricity for supplying either heat or power can be regarded as a public service. We have confined our opinion to the questions asked, which, as we understand them, relate to the manufacture and distribution of gas or electricity solely for the purpose of furnishing light.

MARCUS MORTON.

WALBRIDGE A. FIELD.

CHARLES DEVENS.

WILLIAM ALLEN.

CHARLES ALLEN.

OLIVER WENDELL HOLMES, JR.

MARCUS P. KNOWLTON.

Boston, May 27, 1890.

OPINIONS OF THE JUSTICES

OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[155 *Mass.* 598.]

THE following order was adopted by the House of Representatives on April 12, 1892, and thereupon transmitted to the Justices of the Supreme Judicial Court, who, on May 7, 1892, returned the opinions which are subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions:—

First. Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to purchase coal and wood as fuel, in excess of its ordinary requirements, for the purpose of selling such excess, so purchased, to its own citizens?

¹ This bill was passed by the House, but was referred by the Senate to the next General Court.

Second. Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to purchase, for the purpose of sale, and to sell to its own citizens, coal and wood as fuel?

Third. Is it within the constitutional power of the legislature to enact a law conferring upon cities and towns within this Commonwealth authority to establish and maintain municipal fuel or coal yards for the purpose of selling coal, wood, or other fuel to the inhabitants of such cities and towns?

And be it further ordered, That the Justices of the Supreme Judicial Court be informed that the foregoing questions are propounded with a view to further legislation upon the subjects therein referred to, and that for their more particular information a copy of House Document No. 395, being a bill now pending before this House, and upon the subject-matter of which the foregoing questions are propounded, be transmitted to the justices.

The House Document referred to in the above order, and transmitted therewith to the justices, contained the following bill, entitled "An Act to enable Cities and Towns to purchase, sell, and distribute Fuel." [An abstract of the bill is given in a note.¹]

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

We, five of the Justices of the Supreme Judicial Court, in reply to your order, respectfully submit the following opinion:—

Whether the legislature can authorize a city or town to buy coal and wood, and to sell them to its inhabitants for fuel, must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. { It is settled that the legislature can authorize a city or town to tax its inhabitants only for public purposes. } This is not only the law of this Commonwealth, but of the States generally and of the United States. The following are some of the decisions or opinions on the subject: *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Opinion of the Justices*, 150 Mass. 592; *Kingman v. Brockton*, 153 Mass. 255; *Loan Association v. Topeka*, 20 Wall. 655; *Ottawa v.*

¹ The substance of the bill is as follows: It authorizes (s. 1) any city and town to establish one or more fuel yards to supply the municipality with fuel and to sell and distribute the same to inhabitants who may buy it. It provides (s. 2) that cities must first have authority by a two-thirds vote of each branch of the city council, and the approval of the mayor and of a majority of the voters at an annual municipal election; that towns (s. 3) must have a two-thirds vote at two town meetings called for the purpose,—the later of the two at an interval of from two to thirteen months after the former. Section 4 provides for issuing bonds to pay for establishing the wood-yard and for other financial details. Sections 5 and 6 deal with enlargements of the yards, &c., and with providing regulations of management.—ED.

Carey, 108 U. S. 110; *Cole v. La Grange*, 113 U. S. 1; *Allen v. Jay*, 60 Maine, 124; *Opinion of the Justices*, 58 Maine, 590; *Attorney-General v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *State v. Osawkee*, 14 Kans. 418; *Mather v. Ottawa*, 114 Ill. 659.

It is not easy to determine in every case whether a benefit conferred upon many individuals in a community can be called a public service within the meaning of the rule that taxes can be laid only for public purposes. In general, however, it may be said that the promotion by taxation of the private interests of many individuals is not a public service within the meaning of the Constitution. The preamble of the Constitution declares that "The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights and the blessings of life." It is declared in Part I., Art. I.: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

Constitutional questions concerning the power of taxation necessarily are largely historical questions. The Constitution must be interpreted as any other instrument with reference to the circumstances under which it was framed and adopted. It is not necessary to show that the men who framed it or who adopted it had in mind everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing, to the discussions upon the nature of the government to be established, to the meaning of the language used as then understood, and to the grounds on which the adoption or rejection of the Constitution was advocated before the people. We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the Constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the Constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the Commonwealth or the "towns, parishes, precincts, and other bodies politic" to undertake what had usually been left to the private enterprise of individuals.

In the opinion in *Loan Association v. Topeka*, 20 Wall. 655, 664, the Supreme Court of the United States say: "It is undoubtedly the

duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal."

The early usages of towns undoubtedly did not exhaust the authority which the legislature can confer upon municipalities to levy taxes. Cities and towns, since the adoption of the Constitution, have been authorized to levy taxes for many other purposes than those for which taxes were then levied. Up to the present time, however, none of the purposes for which cities and towns have been authorized to raise money has included anything in the nature of what is commonly called trade or commercial business. Instances can be found of some very curious legislation by towns in the colonial and provincial times, some of which would certainly now be thought to be beyond the powers of towns under the Constitution. Whatever the theory was, towns in fact under the Colony Charter, and for some time under the Province Charter, often acted as if their powers were limited only by the opinion of the inhabitants as to what was best to be done. This was the result of their peculiar situation and condition, and the powers of towns or of the General Court were not much considered. The exercise of these extraordinary powers, however, gradually died out.

The purposes for which, by the Province laws, towns were authorized to raise money were for the maintenance of highways, the support of the ministry, schools, and the poor, and for the defraying of other necessary charges arising within the town. The words "necessary charges" (Pub. Sts. c. 27, § 10, *ad fin.*) are still retained in the statutes, but they have been strictly construed by the courts. We do not find either in the Colony or the Province laws any legislation relating to the buying and selling of coal or wood by towns for the use of the inhabitants, or any legislation on any similar subject. It is possible that there may be found in the records of some town a vote or votes showing that the town in an emergency was authorized to buy wood or coal for the purpose of supplying its inhabitants with fuel, but we have not found any. Certainly it was not usual for towns to supply their inhabitants with fuel, unless they were paupers. Neither was it usual for towns to supply their inhabitants with grain or other commodities. We know of no instance of this being done, except by the town of Boston. In the fall of 1713 there was a scarcity of grain, and the General Court prohibited the exportation of it. 1 Prov. Laws (State ed.) 724. The town of Boston in March,

1713-14, voted to lay in a stock of grain to the amount of five thousand bushels of corn, and to store it in some convenient place, and it was left to the selectmen to dispose of it as they saw fit. 8 Record Commissioner's Reports, 101, 104. After that, as shown by the records, the town regularly bought and stored grain and sold it to the inhabitants as late as 1775, and perhaps later, and it established two granaries, one of which, in the Common, remained in use probably as long as the town bought and sold grain. Whether, after the Revolution, the town continued to buy grain we are not informed, as the records have not been printed. The amount which could be sold to any one person was often limited to a few bushels at a time. The report of a committee in 1774 shows that from March, 1769, to March, 1774, the quantity of corn and rye purchased was 5,836 bushels, and that the stock on hand was 376 bushels. It is apparent that the original purpose was to provide against a famine, and that it was not the intention of the town to assume the business of buying and selling all the grain which the inhabitants needed, but of keeping such an amount in store as was necessary in order that small quantities might be obtained, particularly by the poorer inhabitants, at what the selectmen, or a committee of the town, or the town itself, deemed reasonable prices. On May 25, 1795, the town voted to sell the granary. This action of the town of Boston was an exception to the usages of towns, and it appears from the reports of committees that before the Revolution it had come to be considered as of doubtful expediency, and during the Revolution, or not long after, it was discontinued.

The nearest analogy under the Constitution to the subject we are considering is the authority given by the recent statute (St. 1891, c. 370) whereby cities and towns are empowered to maintain works for the manufacture and distribution of gas or electricity for furnishing light to the municipalities and their inhabitants. In the opinion given to the House of Representatives on May 27, 1890, which is printed in 150 Mass. 592, the justices advised that the manufacture and distribution of gas or electricity for furnishing light to the inhabitants of cities and towns might properly be regarded as constituting a public service. It was there said: "It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not." Gas or electricity for furnishing light has in recent times become a most convenient means of lighting both public and private buildings, streets, and grounds. It is impracticable that each individual should manufacture gas or electricity for himself, but this can best be done by some company or the municipality for a considerable territory, and for the use of both the municipality itself and the inhabitants. Everybody who chooses within that territory cannot be permitted to manufacture and distribute gas or electricity for the public use or the use of other persons, as it is distributed by means of pipes or wires, and the number who properly can be permitted to lay pipes or wires in a given territory must be limited

to one, or at most to a few persons or corporations. The pipes or wires must be laid in or over the public ways, or in or over land taken for the purpose, which may require the exercise of the right of eminent domain. These were some of the reasons why the subject seemed to the justices a proper one for municipal regulation and control, and to constitute a service which a municipality could be authorized to perform for itself and its inhabitants.

But when the Constitution was adopted the buying and selling of wood and coal for fuel was a well-known form of private business, which was generally carried on as other kinds of business were carried on; and is now carried on in much the same manner as it was then. It was and is a kind of business which in its relations to the community did not and does not differ essentially from the business of buying and selling any other of the necessities of life. Although all kinds of business may be regulated by the legislature, yet to buy and sell coal and wood for fuel requires no authority from the legislature, and requires the exercise of no powers derived from the legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise. We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the Commonwealth may exercise, or may authorize cities and towns to exercise, in extraordinary exigencies for the safety of the State or the welfare of the inhabitants. If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the co-operative plan, we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants.

We therefore answer the questions in the negative.

WALBRIDGE A. FIELD.
CHARLES ALLEN.
MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATIMOR.

MAY 7, 1892.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, or gas, or electricity, or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets.

I see no ground for denying the power of the legislature to enact the

laws mentioned in the questions proposed. The need or expediency of such legislation is not for us to consider.

OLIVER WENDELL HOLMES, JR.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

In reply to the questions submitted by your order of April 12, 1892, for the opinion of the Justices of the Supreme Judicial Court, I have to say that under our Constitution "The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights and the blessings of life." Without artificial heat, very few of our inhabitants would have the power of enjoying these rights and blessings. So far, and so far only, as it is a necessity of society as now organized, for the government to supply fuel in order to afford an environment which shall give this power, it is competent for the government to furnish or to provide for a supply. But it is not within its constitutional power to engage in trade or manufacture merely for the purpose of having any branch of business conducted upon a convenient or economical plan. Fuel is now legitimately furnished to paupers by towns and cities at the public expense. If there is an emergency, local or general, which cannot be adequately met by ordinary private agency, it is within the constitutional power of the government to supply the needs of the people in this respect, either through the towns and cities, or through other agencies. The question of the exigency, in the first instance, is for the legislature. If there is no adequate source of supply of fuel except through the establishment of governmental agencies, they may be lawfully inaugurated. If, on the other hand, there is no want of adequate service, the legislature has no constitutional right to create agencies for the purpose. It has no right to authorize towns and cities to engage in trade merely to try an experiment in practical economics, or to put in practice a theory.

My answer to the questions propounded is, therefore, "Yes, if the necessities of society, as now organized, can be met only by the adoption of such measures," and "No, if there is no such necessity, but merely an expediency for the trial of an experiment."

JAMES M. BARKER.

STATE v. CITY OF TOLEDO.

SUPREME COURT OF OHIO. 1891.

[48 Ohio St. 112]

Quo warranto.

On the 22d day of January, 1889, the General Assembly passed an Act which reads as follows: "An Act to authorize cities of the third grade of the first class to borrow money and issue bonds therefor for the purpose of procuring territory and right of way, sinking wells for natural gas, purchasing wells and natural gas works, purchasing and laying pipes, and supplying such cities with natural gas for public and private use and consumption." . . . [The city of Toledo under this Act issued bonds and applied the proceeds to the purposes named above.] This proceeding in *quo warranto* is instituted in this court to oust and exclude the city of Toledo from any and all authority to have, use, and enjoy the liberty, privilege, and franchise of issuing and selling said bonds and devoting the proceeds towards the prosecution of said enterprise of supplying natural gas, on the alleged ground — fully set forth in the opinion of the court — that the said Act of January 22, 1889, is in conflict with the Constitution of this State, and therefore invalid and void in law.

D. K. Watson, Attorney-General, *Doyle, Scott, & Lewis, Thomas W. Sanderson, F. E. Hutchins, Frank H. Hurd*, and *E. D. Potter, Jr.*, for relator. *W. H. A. Read*, City Solicitor, *Barton Smith*, and *Clarence Brown*, for defendant.

DICKMAN, J. . . . We are brought now to the question whether the authority given to Toledo and other cities to issue natural gas bonds, and levy taxes to pay them, was for a purpose of so public and general a nature as not to transcend the legislative power vested in the General Assembly. In holding that there can be no lawful tax which is not imposed for a public purpose, the line of demarcation is by no means clear and distinct and well defined between what is for public and what for private purposes. It would be exceedingly difficult to lay down any general principle, or construct any formula, by which each case as it arises may be assigned to the one or the other side of the line. There are, however, certain objects, the promotion of which, by reason of their being treated as of general necessity, has been decided to be a public use or purpose. Thus it is now the well-settled doctrine throughout the several States that the business of public highways, turnpikes, bridges, canals, and other public means for travel and for the transportation of goods are a public use within the Constitution. The objects and business of aqueduct and water-works companies for the supply of cities and their inhabitants with water are a public use. *Reddall v. Bryan*, 14 Md. 444; *Burden v. Stein*, 27 Ala. 104; *Lumbard v. Stearns*, 4 Cush. 60; *Mayor, etc. v. Bailey*, 2 Denio, 433, 452,

per GARDINER, P. The sewerage of a city is also held to be a public use. *Hildreth v. Lowell*, 11 Gray, 345. Land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is deemed to be taken for a public use. *In re Commissioners of Central Park*, 63 Barb. 282. And in *Bloomfield, etc. Natural Gas Light Co. v. Richardson*, 63 Barb. 437, the corporation undertook to conduct the natural gas flowing from a gas spring or well to the city of Rochester, a distance of about 30 miles. The case, it is true, involved the right of eminent domain, and not taxation, but in a proceeding to acquire the right of way for its mains through the lands of private owners, and to appoint commissioners of appraisal, it was held that the purposes, object, and business of the corporation were a public use within the meaning of the Constitution.

In the present controversy the object proposed is to supply the city and the citizens of Toledo with natural gas "for public and private use and consumption." The terms employed to define the object are comprehensive. Whether for fuel or as an illuminant, the design is to furnish gas for all public buildings, and for the private consumption of the community at large. The expense of the undertaking is not to be incurred in behalf of a favored class of citizens, or to foster certain branches of industry, but for the benefit of all the inhabitants of the city. If natural gas is thereby made cheap, or cheaper than before, to consumers, such an advantage will inure to any and all who may avail themselves of the privilege of using it. Nor does their use of it necessarily imply taxation for the payment of the principal and interest of the bonds issued by the municipality, as the income derived from the consumption of natural gas might prove fully adequate to such payment. Water, light, and heat are objects of prime necessity. Their use is general and universal. It is now well settled that the legislature, in the exercise of its constitutional power, may authorize cities to appropriate real estate for water-works; and levy and assess upon the general tax-list an assessment on all taxable real and personal property in the corporation for the payment of the cost and repair of such water-works; and for the purpose of paying the expenses of conducting and managing the works a water-rent may be assessed upon all tenements and premises supplied with water. And yet, in cities and towns where there are public water-works, there are often large numbers of the inhabitants who do not connect their dwellings or business establishments with the water-pipes laid in the streets, and who rely for their supply of water upon the ordinary methods and sources. They are taxed, nevertheless, for the construction of works of which they may have no immediate need to avail themselves; but such works meet the wants of the rest of the community. And as a protection from fire, as a means for the preservation of health, to supply an article of convenience and necessity to the great body of the citizens, for domestic uses, for operating manufacturing establishments, for heating

houses, for generating steam in all its varied applications, municipalities incur debts and levy taxes for constructing and maintaining expensive water-works. The benefits and conveniences offered may not be embraced by all, but they are, notwithstanding, designed for the general advantage, and subserve what is recognized as a public purpose. The city in its corporate capacity does that for the citizen which he could never accomplish by his individual effort, and leaves it to his option to accept or dispense with the privilege offered.

What we have said in reference to water-works is, for the most part, applicable to the erecting and maintaining of natural or artificial gas works. In *State v. City of Hamilton*, 47 Ohio St. 52, the city issued its bonds for the purpose of erecting artificial gas-works, and furnishing the public lighting for the city. This court held in that case that the city was empowered to erect its own gas-works at the expense of the corporation. It did not become necessary to decide whether, by virtue of the sections of the Revised Statutes then under consideration, the city would be authorized to construct its own gas-works, and furnish gas to the inhabitants for private consumption. That question has been argued in the case at bar by relator's counsel in *State v. City of Hamilton*, now pending in this court, on brief filed in the last-entitled case. But, as throwing light upon the present investigation, and as an authority entitled to the highest respect we must acknowledge the force of the language used in Opinion of the Justices of the Supreme Court to the House of Representatives, 150 Mass. 592, 597. In rendering the opinion that the legislature has the power under the Constitution to authorize the cities and towns within the Commonwealth to manufacture and distribute gas or electric light for use in their public streets and buildings, and for sale to their inhabitants, it is said: "If gas or electricity is to be generally used in a city or town it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain. . . . If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think that the legislature can confer the power."

Heat being an agent or principle indispensable to the health, comfort, and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. It is inquired, why do not municipalities also purchase coal mines, and issue their bonds therefor, and embark in the business of mining and selling coal to private consumers? An obvious reply is that coal and other fuel may be carried to the consumer by the ordinary channels of transportation, and at comparatively moderate expense, while, in conveying natural gas, streets must be opened, pipes laid, works erected, fixtures

and machinery purchased, and other expenses incurred, beyond the enterprise and capital of an individual. The objection that a work or undertaking prosecuted by a city at the public expense does not benefit some individuals will not deprive it of the character of a public service, or of an object for public purposes. Some individuals, as we have before suggested, may be incidentally benefited more than others; and some, from their place of residence in a city, may not use the work at all. It is sufficient "if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants."

The source of supply of natural gas to the people of Toledo, it is said, is beyond the corporate limits; but the right of a city to aid in the construction of public works is not necessarily confined to those works which are within the locality whose people are to be taxed for them. It is the corporate interest of the city which determines the right to tax her people, and not the location of the public improvement. *Sharpless v. Mayor, etc.*, 21 Pa. St. 147.

It is conceded that if the Act of January 22, 1889, had authorized cities to procure natural gas solely for their own use and consumption — or for use only in public buildings and places — it would not be open to constitutional objection; but, as the Act provides for supplying cities and the citizens thereof with natural gas for public and private use and consumption, it is urged that the manifest design of the Act is to enable the city to furnish fuel to individual consumers for private use at a cheaper rate than they could obtain it from other sources; and that, such being its main object, the city cannot exercise the taxing power in promoting a purpose that is essentially private, as distinguished from one that is public. We do not so read the Act. In our view, it may as well be urged that to supply the city and public buildings with natural gas was the primary object of the Act, and the furnishing of it to citizens merely incidental thereto, as that to supply individuals was the primary object, and the supplying of the city and public buildings only incidental. But, granting that it entered into the design of the legislature to cheapen the price of natural gas, it was to cheapen it for all the inhabitants of the city, and that fact would become significant as rendering the public purpose of the Act more useful and effective.

There is a class of cases to which our attention has been called, in which are considered the legislative authority under the Constitution to pass laws enabling cities to assist individuals or corporations to establish or carry on manufacturing of various kinds within or without the corporate limits; but those cases bear but a slight analogy to the one before us. Among them, and of a cognate character, is that of *Association v. Topeka*, 20 Wall. 655. In that case the Citizens' Savings' & Loan Association of Cleveland brought their action in the court below against the city of Topeka on coupons for interests attached to bonds of that city. The bonds, on their face, purported to be payable to the King Wrought-Iron Bridge Manufacturing & Iron Works Company of Topeka, to aid and encourage that company in establishing and

operating bridge shops in the city of Topeka. The city issued 100 of those bonds for \$1,000 each as a donation, to encourage that company in its design of establishing a manufactory of iron bridges in that city. It was properly held that there was no power in the legislature to pass a statute authorizing the levy of taxes in aid of such a purpose. The avowed object in issuing the bonds was to aid a private enterprise, to promote the interests of a private company designated by name, and singled out from all others. When the legislature authorized the city to contract the debt, the authority was implied to levy such taxes as were necessary to pay the debt. The authority was thus given, under the guise of taxation to pay the bonds, to reach the property of the citizens, and use it in aid of a private manufacturing company. The benefit accruing to the public, if any, was at most incidental, and might prove to be remote and speculative. The proprietors of the iron-works were under no legal obligations to render any duty or service whatever to the municipality or State. Nor could the State or city compel them to complete or operate the works or prevent their removal at pleasure to some other locality.

The natural gas works for which Toledo has issued its bonds, are owned and controlled by the municipality. and not by individuals; but every citizen, as a member of the community, has an interest in their construction, management, and maintenance. The advantage resulting from them is tendered on equal terms to every inhabitant of the city, and the terms and conditions upon which the benefits are to be enjoyed by the whole people are dependent largely upon the action of the people themselves. In our judgment, the taxation authorized by the General Assembly for the payment of the bonds issued was in no wise to subserve a private purpose, when used as language of constitutional limitation. The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy. But in deciding whether in a given case the object for which taxes are assessed is a public or private purpose we cannot leave out of view the progress of society, the change of manners and customs, and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And in deciding whether such taxes shall be levied for the new purposes that have arisen we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied. . . .

*Judgment for defendant, and petition dismissed.*¹

¹ Compare *Cooley*, Princ. Const. Law, 2d ed. 57; *Talbot v. Hudson*, 16 Gray, 417, ante, p. 156; 5 Harv. Law Rev. 30. — ED.

COMMONWEALTH v. HAMILTON MANUFACTURING
COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1876.

[120 Mass. 383.]

COMPLAINT under the St. of 1874, c. 221, to the Police Court of Lowell against a cotton and woollen manufacturing company, for employing an unmarried woman named Mary Shirley, who was over twenty-one years of age, to work in the defendant's manufacturing establishment in the manufacture of cotton goods for sixty-four hours per week. The defendant demurred to the complaint upon the following grounds: "1. That the St. of 1874, c. 221, is unconstitutional and void. 2. That the defendant, having been incorporated under a charter prior to the passage of the statute under which the complaint was made, the statute was, as applied to the defendant, in violation of the obligation of the Commonwealth to the defendant assumed in the charter, and was therefore void and of no force and effect against the defendant." The demurrer was overruled; the defendant was found guilty; and appealed to the Superior Court, where the demurrer was overruled and the judgment of the Police Court affirmed; and the defendant appealed to this court.

C. B. Goodrich and *F. T. Greenhalge*, for the defendant.

C. R. Train, Attorney-General, and *W. C. Loring*, Assistant Attorney-General, for the Commonwealth.

LORD, J. The defendant contends that the St. of 1874, c. 221, under which the complaint in this case is made, is unconstitutional and void. The provision, which it is alleged is without authority under the Constitution, is, that "no minor, under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm or corporation in any manufacturing establishment in this Commonwealth more than ten hours in any one day," except in certain cases, and that "in no case shall the hours of labor exceed sixty per week."

The learned counsel for the defendant in his argument did not refer to any particular clause of the Constitution to which this provision is repugnant. His general proposition was, that the defendant's Act of Incorporation, St. 1824, c. 44, is a contract with the Commonwealth, and that this Act impairs that contract. The contract, it is claimed, is an implied one; that is, an Act of Incorporation to manufacture cotton and woollen goods by necessary implication confers upon the corporation the legal capacity to contract for all the labor needful for this work. If this is conceded to the fullest extent, it is only a contract with the corporation that it may contract for all lawful labor. There is no contract implied that such labor as was then forbidden by

was only a contract with the Corp. that it might contract for such labor as was lawful. The law violated no contract as it was taken subject to the right of the legislature to

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subject of legislation. 2 The law was not in violation of any right reserved to the individual citizen, as it did not forbid any person to work as many hours a week as he chose.

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law might be employed by the defendant; or that the General Court would not perform its constitutional duty of making such wholesome laws thereafter as the public welfare should demand. The law, therefore, violates no contract with the defendant; and the only other question is, whether it is in violation of any right reserved under the Constitution to the individual citizen. Upon this question, there seems to be no room for debate. It does not forbid any person, firm or corporation from employing as many persons or as much labor as such person, firm or corporation may desire, nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that in an employment, which the legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this Commonwealth that reference to the decisions is unnecessary.

It is also said that the law violates the right of Mary Shirley to labor in accordance with her own judgment as to the number of hours she shall work. The obvious and conclusive reply to this is, that the law does not limit her right to labor as many hours per day or per week as she may desire; it does not in terms forbid her laboring in any particular business or occupation as many hours per day or per week, as she may desire; it merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is so clearly within the power of the legislature, that it becomes unnecessary to inquire whether it is a matter of grievance of which this defendant has the right to complain.

Judgment affirmed.

Deft. was indicted for
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COMMONWEALTH v. PERRY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[155 Mass. 117.]

INDICTMENT, on the St. of 1891, c. 125, in two counts, alleging in the first count that the defendant on July 13, 1891, did "impose and exact a fine, to wit, a fine of forty cents," upon one Fielding, then employed by him in his factory in Dudley in weaving woollen cloth, "for imperfections that had arisen during the process of weaving in the cloth and material woven by the said" Fielding, while he was so employed and engaged at weaving; and in the second count that the defendant at the same time and place did "withhold a certain part of the wages of said" Fielding while so employed and engaged, "to wit, the sum of forty cents for and on account of imperfections" in the weaving of Fielding, as set out in the first count.

as engaged in his work of weaving. The deft. had entered into a verbal contract with the weavers employed by him whereby the latter agreed to take reduced rates and prices for all

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on withholding wages, or any part thereof, for imperfections arising during the process of weaving. And the right to employ weavers

In the Superior Court, before the jury were impanelled, the defendant moved to quash the indictment for the following reasons. . . . [These are omitted here, as not material to the opinion of the court.]

Thompson, J., overruled this motion.

At the trial the following facts were agreed. The defendant is a woollen manufacturer in the town of Dudley, and employed among other operatives about forty weavers. On May 18, 1891, the defendant entered into an agreement in writing under seal with such weavers, whereby in consideration of the defendant's employing them and paying them their wages monthly at certain fixed rates, they agreed among other things to accept his employment and serve him faithfully during such employment and to accept as wages "for all imperfect weaving work such reduced rates and prices, and at such rates and prices less than those paid for perfect work, as the said Perry shall deem reasonable and proper compensation for imperfections in weaving, or imperfect work, and a fair compensation for the work actually done," and "to pay to said Perry monthly, from the wages earned in his employ in weaving, the amount of such deductions for imperfect work and imperfections as said Perry on inspection shall find and judge due him for the damage, loss, and injury caused by such imperfect weaving, or imperfections, — whether such deductions be called 'fines,' 'deductions,' or be called by any other name, — which damage, fines, or deductions for such imperfect weaving and imperfections are hereby assumed, and covenanted and promised to be paid to said Perry from wages earned in said employment, as compensation for the loss and injury caused to said Perry thereby." Among the weavers signing this agreement with the defendant was the Fielding referred to in the indictment, and he had remained in the defendant's employ continuously since the date of the agreement. The wages earned by Fielding in June, 1891, would have amounted to \$21.53, if the cloth woven by him had been free from imperfections, but by reason of such imperfections, which arose during the process of weaving and which injured its merchantable value, the defendant deducted therefrom and withheld from him the sum of fifteen cents and paid him for his work the balance of \$21.38. This balance was a reasonable compensation for the work actually done by Fielding during that month, and the fifteen cents so deducted did not represent the actual damage done to the defendant by the imperfect work done by him.

The defendant requested the judge to rule, among other things, as follows: "Chapter 125 of the Acts of the Legislature of the year 1891, under the provisions of which the defendant was indicted, is unconstitutional and void, especially because it is in violation of the provisions thereof against granting special advantages to a class of the people as distinguished or distinct from the community, and because also it is repugnant to other fundamental principles thereof."

The judge refused so to rule, and instructed the jury, as matter of law, that, upon the agreed facts, the jury would be authorized to find the defendant guilty, and submitted the case to them.

the making of such contracts and permits the hiring of weavers only upon the terms that prompt payment be made as for good work, no matter how badly it might be done then it was an

right of Contract being guaranteed by the Const. the law is unconstitutional.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

A. J. Bartholomew, for the defendant.

A. E. Pillsbury, Attorney-General, for the Commonwealth.

KNOWLTON, J. This is an indictment under the St. of 1891, c. 125, the first section of which is as follows: "No employer shall impose a fine upon or withhold the wages or any part of the wages of an employee engaged at weaving for imperfections that may arise during the process of weaving." Section 2 provides a punishment for a violation of the provisions of the statute by the imposition of a fine of not exceeding one hundred dollars for the first offence, and not exceeding three hundred dollars for the second or any subsequent offence.

The Act recognizes the fact that imperfections may arise in weaving cloth, and it is evident that a common cause of such imperfections may be the negligence or want of skill of the weaver. When an employer has contracted with his employee for the exercise of skill and care in tending looms, it forbids the withholding of any part of the contract price for non-performance of the contract, and seeks to compel the payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done. It does not purport to preclude the employer from bringing a suit for damages against the employee for a breach of the contract, but he must pay in the first instance the wages to which the employee would have been entitled if he had done such work as the contract called for. It is obvious that a suit for damages against an employee for failure to do good work would be in most cases of no practical value to the employer, and a theoretical remedy of this sort does not justify a requirement that a party to such a contract shall pay the consideration for performance of it when it has not been performed. The defendant contends that the statute is unconstitutional, and it becomes necessary to consider the question thus presented.

The employer is forbidden either to impose a fine or to withhold the wages or any part of them. If the Act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative power conferred by the Constitution of this Commonwealth, in chap. 1, sect. 1, art. 4, which authorizes the General Court "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." It might well be held that, if the legislature should determine it to be for the best interests of the people that a certain class of employees should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price

prohibits the making of unreasonable laws.

for good work when only inferior work is done, a different question is presented.

There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article 1 of the Declaration of Rights in the Constitution of Massachusetts enumerates among the natural, inalienable rights of men the right "of acquiring, possessing, and protecting property." Article 1, § 10, of the Constitution of the United States provides, among other things, that no State shall pass any "law impairing the obligation of contracts." The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.

The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution. If the statute is held to permit a manufacturer to hire weavers, and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to every one when it declares that he has a "natural, essential, and unalienable" right of "acquiring, possessing, and protecting property." Whichever interpretation be given to this part of the Act, we are of opinion that it is unconstitutional; and inasmuch as the instructions of the judge permitted the jury to find the defendant guilty on the second count, a new trial must be granted.

We do not deem it important to consider the other exceptions taken by the defendant, further than to say that we are of opinion that the motion to quash was rightly overruled.

For cases supporting the view we have taken, and for a further discussion of the principles involved in the decision, see *Godcharles v.*

The statute went into effect in April 28, 1891

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Wigeman, 113 Penn. St. 431; *State v. Goodwill*, 33 W. Va. 179; *In re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377; *People v. Gillson*, 109 N. Y. 389; *Millett v. People*, 117 Ill. 294.

Exceptions sustained.

HOLMES, J. I have the misfortune to disagree with my brethren. I have submitted my views to them at length, and, considering the importance of the question, feel bound to make public a brief statement, notwithstanding the respect and deference I feel for the judgment of those with whom I disagree.

In the first place, if the statute is unconstitutional, as construed by the majority, I think it should be construed more narrowly and literally, so as to save it. Taking it literally, it is not infringed, and there is no withholding of wages, when the employer only promises to pay a reasonable price for imperfect work, or a price less than the price paid for perfect work, and does pay that price in fact. But I agree that the Act should be construed more broadly, and should be taken to prohibit palpable evasions, because I am of opinion that even so construed it is constitutional, so far as any argument goes which I have heard. The prohibition, if any, must be found in the words of the Constitution, either expressed or implied upon a fair and historical construction. What words of the United States or State Constitution are relied on? The statute cannot be said to impair the obligation of contracts made after it went into effect. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391. So far as has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing, and protecting property any more than the laws against usury or gaming. In truth, I do not think that that clause of the Bill of Rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the Constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so.

But if the statute did no more than to abolish in certain cases contracts for a *quantum meruit*, and recoupment for defective quality not amounting to a failure of consideration, I suppose that it only would put an end to what are, relatively speaking, innovations in the common law, and I know of nothing to hinder it. This, however, is not all. I do not confine myself to technical considerations. I suppose that this Act was passed because the operatives, or some of them, thought that they were often cheated out of a part of their wages under a false pretence that the work done by them was imperfect, and persuaded the legislature that their view was true. If their view was true, I cannot doubt that the legislature had the right to deprive the employers of an honest tool which they were using for a dishonest purpose, and I cannot

pronounce the legislation void, as based on a false assumption, since I know nothing about the matter one way or the other. The statute, however construed, leaves the employers their remedy for imperfect work by action. I doubt if we are at liberty to consider the objection that this remedy is practically worthless; but if we are, then the same objection is equally true, although for different reasons, if the workmen are left to their remedy against their employers for wages wrongfully withheld. My view seems to me to be favored by *Hancock v. Yaden*, 121 Ind. 366, and *Slaughter-House Cases*, 16 Wall. 36, 80, 81.¹

BRACEVILLE COAL CO. v. THE PEOPLE.

SUPREME COURT OF ILLINOIS. 1893.

[147 Ill. 66.]

APPEAL from the County Court of Grundy County; the Hon. A. R. JORDAN, JUDGE, presiding.

The appellant was tried before a justice of the peace, and found guilty of violating an Act of the Legislature entitled "An Act to provide for the Weekly Payment of Wages by Corporations," approved April 23, 1891, and the penalty of fifty dollars imposed, for which and costs judgment was rendered accordingly. The case was taken by appeal to the County Court of Grundy County, where a trial was held by the court, a jury having been waived, and appellant again found guilty, and the penalty of fifty dollars imposed, and judgment entered for that amount and costs; and the case is brought here by further appeal.

The Act of the Legislature above referred to provides "that every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone, and municipal corporation and every incorporated express company and water company, shall pay weekly each and every employee engaged in its business the wages earned by such employee to within six days of the date of such payment; provided, however, that if at any time of payment any employee shall be absent from his regular place of labor he shall be entitled to said payment at any time thereafter upon demand." And, after providing a penalty of not less than ten dollars nor more than fifty dollars for each violation, that such action be commenced within thirty days after the violation, notice to the corporation that an action will be brought, defences that may not be set up, etc., proceeds: "No assignment of future wages payable weekly under the provisions of this Act shall be valid if made to the corporation from whom such wages are to become due, or to any person on behalf of such corporation or if made or procured to be made to any person for the purpose of relieving such corporation from the obligations to pay weekly under the provisions of

¹ See *Archer v. James et al.*, 2 Best & Sm. 61 (1862).—ED. the employment

of deft. corp. and was required to sign as a condition precedent to being employed, a contract that pay day should occur only once a month &c. When complaint

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this Act. Nor shall any of said corporations require any agreement from an employee to accept wages at other periods than as provided in section 1 of this Act, as a condition of employment."

Appellant became a corporation under the general incorporation law, in force July 1, 1872, and for several years past has been engaged in the business of coal-mining, with its principal office at Braceville, Grundy County, this State. A certain contract is provided by appellant, which all persons desiring employment in its service are required to sign as a condition precedent to such employment. The complaining witness, Thomas McGuire, in November, 1891, applied to the superintendent of appellant's mines for work, and was required to sign one of its contracts, which was done, in duplicate, each party retaining a copy. Certain rules and regulations of the company on the back of its contracts are, by the terms of each contract, made a part of the same. The contract of witness McGuire, after stipulating, among other things, the wages to be paid, etc., provides: "All payments, hereunder to be made on regular pay-day, and in compliance with the rules and regulations above named; and pay-day is hereby fixed for and on the first Saturday after the 10th of each month, when and at which time all wages or moneys that may have been earned during and in the calendar month next prior to such pay-day shall be paid, less all moneys owing said party of the first part on any account whatever." By the seventh rule, printed on the back of said contract, and made part thereof, it is provided: "Every employee will be paid once a month at regular pay-day all wages or moneys he may have earned during and in the calendar month next prior to such pay-day, after deducting any indebtedness which such employee may owe to the company, or which the company, with the consent of such employee, may have assumed to pay to any other person." McGuire entered upon the employment under the contract November 3, 1891, and quit November 13, 1891, and demanded his wages. The company refused to pay him before the next pay-day, when he gave the notice under the statute, and caused this suit to be brought.

George S. House, for appellant.

Mr. S. C. Stough and *Mr. William Mooney*, for the People.

MR. JUSTICE SHORE delivered the opinion of the court: The principles that must control the decisions of this case were announced in *Fraser v. People*, 141 Ill. 171. Unless we are prepared to recede from the doctrine of that case, and the subsequent case of *Ramsey v. People*, 142 Ill. 380, the Act under consideration must be likewise held unconstitutional and void. Section 2 of art. 2, of the Constitution of this State guarantees that no person shall be deprived of life, liberty, or property without due process of law. We said in the *Fraser Case*, the words "due process of law" "are to be held synonymous with 'the law of the land,'" and, quoting from *Millett v. People*, 117 Ill. 294, said: "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affect-

necessarily fix the right to fix the price at wh. labor will be paid
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stricted in either in a manner different from that enjoyed
liberty and

ing the rights of private individuals or classes of individuals." There can be no liberty, protected by government, that is not regulated by such laws, as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject to the restraints necessary to secure the same right to all others. The fundamental principle upon which liberty is based in free and enlightened government is equality under the law of the land. (It has accordingly been everywhere held that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Fraser v. People*, supra; *Com. v. Perry*, 155 Mass. 117; *People v. Gillson*, 109 N. Y. 389; *Live-Stock, etc. Ass'n v. Crescent City, etc. Co.*, 1 Abb. (U. S.) 388; *Slaughter-House Cases*, 16 Wall. 36; *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179. (Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it. And the right of property preserved by the Constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guarantee. In the *Fraser Case*, we said: "The privilege of contracting is both a liberty and a property right, and if A. is denied the right to contract, and acquire property in the manner which he has hitherto enjoyed under the law, and which B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property, to the extent that he is thus denied the right to contract;" and quoted with approval: "The man or the class forbidden the acquisition or enjoyment of the property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness." *Cooley*, Const. Lim. 393.

It is undoubtedly true that the people in their representative capacity may, by general law, render that unlawful, in many cases, which had hitherto been lawful. But laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction or reason, not applicable to others, not included within its provisions. *Id.* 391. And it is only when such distinctions exist that differentiate in important particulars, persons, or classes of persons from the body of the people, that laws

having operation only upon such particular persons or classes of persons have been held to be valid enactments. In the *Millett Case* we held that it was not competent, under the Constitution, for the legislature to single out operators of coal mines and impose restrictions in making contracts for the employment of labor which were not required to be borne by other employers. And in the *Frerer Case*, a law singling out persons, corporations, or associations engaged in mining and manufacturing, and depriving them of the right to contract as persons, corporations, and associations engaged in other business or vocation might lawfully do, was in violation of the Constitution, and void. So in *Ramsey v. People*, 142 Ill. 380, "An Act to provide for the Weighing in Gross of Coal hoisted from Mines," approved June 10, 1891, was held unconstitutional and void for the same reason.

The Act under consideration applies not to all corporations existing within the State, or to all that have been or may be organized for pecuniary profit under the general incorporation laws of the State. There is no attempt to make a distinction between corporations and individuals who may employ labor. The slightest consideration of the Act will demonstrate that many corporations that may be and are organized and doing business under the laws are not included within the designated corporations. No reason can be found that would require weekly payments to the employees of an electric railway that would not require like payment by an electric light or gas company; to a corporation engaged in quarrying or lumbering that would not be equally applicable to a corporation engaged in erecting, repairing, or removing buildings or other structures; to mining that would not exist in respect of corporations engaged in making excavations and embankments for roads, canals, or other public or private improvements of like character: that will apply to a street or elevated railway that will not make it equally important in other modes of transportation of freight and passengers. The public records of the State will show, and it is a matter of common knowledge, that very many corporations have been organized and are doing business in the State which necessarily employ large numbers of men that are not included within the Act under consideration.

The restriction of the right to contract affects not only the corporation, and restricts its right to contract, but that of the employee as well. We need not repeat the argument of the *Frerer Case* upon this point. An illustration of the manner in which it affects the employee, out of many that might be given, may be found in the conditions arising from the late unsettled financial affairs of the country. It is a matter of common knowledge that a large number of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus

enable the factories or workshops to be open and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this State, and under this law, no such contract could be made. The employee who sought to work for one of the corporations enumerated in the Act would find himself incapable of contracting as all other laborers in the State might do. The corporations would be prohibited entering into such a contract, and, if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. They would, by the Act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract for and to receive the benefit of their labor, as others might do, denied them.

But, treating the restrictions as affecting the corporations only, it is insisted that the reservation of authority by the General Assembly in section 9 of the General Incorporation Act (chapter 32, Rev. St.) authorized the passage of the Act in question. That section provides: "The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under this Act." It is said this section entered into and formed a part of the contract under which the grant of the corporate franchise was conferred upon appellant company, it having been organized under the general law. It was expressly held that the reservation of the right to alter, amend, or repeal the charter entered into and formed a part of the contract between the State and the corporation chartered under the Constitution of 1848, and that the power reserved might be constitutionally exercised. *Butler v. Walker*, 80 Ill. 345. And undoubtedly the same construction should be placed upon the reservation of power in the section quoted. But by section 1, art. 11, of the Constitution it is provided: "No corporation shall be created by special laws, or its charter extended, changed or amended, . . . but the General Assembly shall provide by general laws for the organization of all Corporations hereafter to be created." The manifest intention of this provision of the Constitution was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special Acts, applying to particular corporations only, and not to the general body of corporations created under the Act, would fall within the prohibition of this section.

By the general incorporation law appellant company was granted the right to contract as a corporation in and about the business for which it was organized. A restriction of its right to thus contract is necessarily

an amendment or change of its corporate powers and functions of its charter. If, therefore, the restriction is held to fall within the power reserved in section 9 of the Act, it must, in view of the constitutional provision, be construed as reserving the power to prescribe such regulations and provisions as the legislature may deem advisable by general law. The Act under consideration, not being a general law, is therefore not a warranted exercise of power.

We need not extend this opinion by further discussion. The right to contract necessarily includes the right to fix the price at which labor will be performed, and the mode and time of payment. Each are essential elements of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large is deprived of liberty and property. The enactment being unconstitutional, there is no law authorizing the judgment of the County Court, and it will accordingly be reversed.¹

¹ And so *Leep v. St. Louis, &c. Ry. Co.*, 25 S. W. Rep. 75 (Ark. Feb. 1894), but allowing such legislation as against corporations.

In *Ramsey v. The People*, 142 Ill. 380, BAILEY, C. J., for the court, said: "In the recent case of *Frerer v. People* (Ill. Sup.), 31 N. E. Rep. 395, we had occasion to consider another statute passed by the same legislature, and involving, in the main, the same constitutional principles as the one now before us, and reached the conclusion that the statute in question in that case is unconstitutional and void. That statute made it unlawful for any person, company, corporation, or association engaged in any mining or manufacturing business to engage in, or be interested, either directly or indirectly, in the keeping of a truck store, or the controlling of any store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to his, its, or their employees, while engaged in mining or manufacturing. We held that said statute was a prohibition, not only upon the employer engaged in mining or manufacturing, but also upon his employees, and took from both the right and liberty belonging to all other members of the community to enter into such contracts, not contrary to public policy, as they may see fit; that the legislature had no power to deprive one class of persons of privileges allowed to other persons under like conditions; that the privilege of contracting is both a liberty and a property right, protected by that provision of the Constitution which guarantees that no person shall be deprived of his liberty or property without due process of law; and that if one person is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which is still allowed to other members of the community, he is deprived of both liberty and property, to the extent that he is thus deprived of the right of contract. We are of the opinion that the same rule, in substance, laid down in the *Frerer Case* applies here, and we need therefore do little more than refer to what is said in the opinion in that case. The statute now before us, in like manner with the one under consideration there, attempts to take from both employer and employee, engaged in the mining business, the right and power of fixing by contract the manner in which such wages are to be ascertained. The statute makes it imperative, where the miner is paid on the basis of the amount of coal mined, whatever may be the wishes or interests of the parties, that the coal shall be weighed on the pit cars before being screened, and that the compensation shall be computed upon the weight of the unscreened coal. In all other kinds of business involving the employment of labor, the employer and employee are left free to fix by contract the amount of wages to be paid, and the mode in which such wages shall be ascertained and computed. This is justly regarded as a very important right, vitally affecting the interests of both parties. To the extent to which it is abridged, a property right is taken away. There is nothing in the business of coal-mining which renders either the employer or employee less capable

STATE v. LOOMIS.

SUPREME COURT OF MISSOURI. 1893.

[115 Mo. 307.]¹

Dysart & Mitchell and Lee, McKeighan, Ellis, and Priest, for appellants.

BLACK, C. J. This is an information in two counts, filed by the prosecuting attorney of Macon County against the three defendants, engaged in carrying on the business of mining coal in that county. The first count avers that the defendants did unlawfully issue and circulate in payment of wages a certain order, check, etc., payable to P. Daniels otherwise than in money, without being payable, at the option of the holder, in merchandise or money. The second count states, in substance, that defendants unlawfully failed to redeem a certain order, check, etc., issued to P. Daniels in payment for wages, the same having been presented for payment thirty days from the date of the delivery thereof. The information is based upon sections 7058, 7060, of the Revised Statutes of 1889. [These sections are given in the note.²]

of contracting in respect to wages than in any of the other numerous branches of business in which laborers are employed under analogous conditions. There is no difference, at least in kind, so far as this matter is concerned, between coal-mining, on the one hand, and other varieties of mining, quarrying stone, grading and constructing railroads, and their operation when constructed, manufacturing in all its departments, the construction of buildings, agriculture, commerce, domestic service, and an almost infinite variety of other avocations requiring the employment of laborers, on the other hand. Upon what principle, then, can those engaged in coal-mining be singled out, and subjected to restrictions of their power to contract as to wages, while those engaged in all these other classes of business are left entirely free to contract as they see fit? We think the attempt of the legislature to impose such restrictions is clearly repugnant to the constitutional limitation above referred to, and therefore void." — ED.

¹ In Banc, reversing a decision of the same court, Division No. 1, in the same case, in October, 1892, 22 S. W. Rep. 332. See the elaborate opinion of Thomas, J., as there reported. — ED.

² The first of these sections provides: "It shall not be lawful for any corporation, person, or firm engaged in manufacturing or mining in this State to issue, pay out, or circulate for payment of the wages of labor, any order, check, memorandum, token, or evidence of indebtedness, payable, in whole or in part, otherwise than in lawful money of the United States, unless the same is negotiable and redeemable at its face value, without discount, in cash or in goods, wares, or merchandise or supplies, at the option of the holder, at the store or other place of business of such firm, person, or corporation; . . . and the person who, or corporation, firm, or company which, may issue any such order, check, memorandum, token, or other evidence of indebtedness, shall, upon presentation and demand within thirty days from date of delivery thereof, redeem the same in goods, wares, merchandise, or supplies at the current cash market price for like goods, wares, merchandise, or supplies, or in lawful money of the United States, as may be demanded by the holder of any such order, memorandum, token, or other evidence of indebtedness: *provided*," etc. Section 7060 makes it a misdemeanor for any person, firm, or company engaged in mining or manufacturing to issue or circulate, in payment of wages, any order, check, etc., payable otherwise than as provided in section 7058; or to fail to redeem any such order, check, etc., in money when presented for payment.

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within the time specified was made a misdemeanor. Deft. had issued a "credit coupon check book" to an employee in payment of wages to the amount of \$5.00 which was expressly declared

A "Trust Act" in Mo. made it unlawful for any manufacturing mining co. to issue a payment of wages any order or memorandum - and check pay in whole or in part otherwise than in lawful money of the U.S. unless the same is negotiable and redeemable at its face value in cash or in goods at the option of the holder at the store or place of business of the Co. Failure to redeem a such order or check

...a subsequent assignee of the book presented it at the store, but payment was refused. Upon an infor-

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The Circuit Court, sitting as a jury, found the defendants guilty as charged in the first count of the information, and assessed their punishment at a fine of \$10, and they appealed.

The evidence discloses the following facts: The defendants, composing the firm of Loomis & Snively, were the owners of coal mines, and in connection with that business carried on a store. Peter Daniels worked for them as a miner. At the end of January, 1891, he owed them \$43.20. On the 18th of the following February he had earned, as wages during that month, \$5.50, and on that day he requested, and the defendants' clerk gave him a "credit coupon check-book" upon their store. The coupons were in sums of five, ten, and twenty-five cents, and aggregated five dollars. It is stated on the back of the book that "the coupons in this book are not good, if detached, and are payable only in merchandise when presented by P. Daniels." Each coupon says: "Good for merchandise at our store. Not transferable. Loomis & Snively." Daniels assigned this check-book to Burge, who assigned it to Hughes, and he transferred it to Mr. Williams. The latter presented it to the defendants for payment on the 2d of April, 1891, and they then refused payment. The proof shows that defendants had monthly pay-days. On these days they gave out no orders or checks, but paid the miners what was due them in cash. At the close of the evidence, the defendants asked the court to discharge them, because the statute upon which the information was founded was unconstitutional, and therefore void, which request the court refused. The contention is that the two sections of the statute before mentioned are in conflict with several clauses of the Constitution of this State, and especially the following:—

"1. That all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry;"

"2. That no person shall be deprived of life, liberty, or property, without due process of law;"

"3. And that they violate that part of the Fourteenth Amendment of the Constitution of the United States which declares: 'Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws.'"

The words "due process of law," as used in these clauses of both constitutions, mean the same as "the law of the land." Story, Const. (5th ed.) § 1943; Cooley, Const. Lim. (6th ed.) 430. It was said in *Railway Co. v. Humes*, 115 U. S. 512: "In England the requirement of due process of law, in cases where life, liberty, and property are affected, was originally designed to secure the subject against the arbitrary actions of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land;' and a similar purpose must be ascribed to them when applied to a legislative body in this country." It is now axiomatic that "everything which may pass under the form of an enactment is not, therefore, to be considered

sonia. Majority, and that the act was arbitrary.
But it was not arbitrary. Fact that court can not

the law of the land." Speaking of these words, Mr. Justice Johnson said: "They were intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice." *Bank v. Okely*, 4 Wheat. 235. "Law of the land" is said to mean a law binding upon every member of the community under similar circumstances. *Wally's Heirs v. Kennedy*, 2 Yerg. 554. The word "liberty," as used in these constitutional declarations, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right to self-defence against unlawful violence, and the right to freely buy and sell as others may. 2 Story, Const. (5th ed.) § 1590.

From the foregoing descriptions and definitions of "due process of law," or its equivalent, "law of the land," it must be evident that this constitutional safeguard condemns arbitrary, unequal, and partial legislation; and it is equally clear that the right to make contracts, and have them enforced, as others may, is one of the rights so secured to every citizen. There is no doubt but many of our legislative enactments operate upon classes of individuals only, and they are not invalid because they so operate, so long as the classification is reasonable and not arbitrary. Thus, it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the legislature to prescribe police regulations applicable to localities and classes is very great because such laws are designed to protect property, and the safety, health, and morals of the citizen. But classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature, or color of the hair. Such a classification, for such a purpose, would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land. When speaking upon this subject, Judge Cooley says: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacity in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to

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others, it can scarcely be doubted that the Act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid an individual or a class the right to the acquisition and enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who shall claim a right to do so ought to be able to show specific authority therefor, instead of calling upon others to show how and where the authority is negatived." Cooley, Const. Lim. (6th ed.) 484.

There can be no doubt but the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees; but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons: "You cannot contract for labor payable alone in goods, wares, and merchandise. The farmer, the merchant, the builder, and the numerous contractors employing thousands of men may make such contracts, but you cannot." They say to the mining and manufacturing employees: "Though of full age, and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may." It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary, every-day contracts, — a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract.

Now, it may be that instances of oppression have occurred, and will occur, on the part of some mine owners and manufacturers, but do they not occur quite as frequently in other fields of labor? Conceding that such instances may and do occur, still that furnishes no reasonable basis for depriving all persons engaged in the two lawful and necessary pursuits of the right to make and enforce every-day contracts. Liberty, as we have seen, includes the right to contract as others may, and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen. Applying the principle of constitutional law before stated, we can come to no other conclusion than this: That these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they can stand, it is difficult to see an end to such legislation, and the government becomes one of special privileges, instead of a compact "to promote the general welfare of the people." We place our conclusion on the broad ground that these sections of the statute are not "due process of law," within the meaning of the Constitution.

Statutes like or analogous to the one in hand have been enacted in several of the States of this Union, and they have been the subject of consideration of several courts of last resort ; and it is well to examine those cases with some detail, for it must be obvious that general constitutional declarations are the better understood when seen in the light of the facts of the particular cases in which they have been applied. The Supreme Judicial Court of Massachusetts had under consideration, in *Com. v. Perry* [155 Mass. 117], 28 N. E. Rep. 1126, a statute which provides that "no employer shall impose a fine upon, or withhold, the wages, or any part of the wages, of an employee engaged at weaving, for imperfections that may arise during the process of weaving." It was held that, if the Act went no further than to forbid the imposition of a fine for imperfect work, it might be sustained, but that the attempt to make inferior work answer a contract for good work presented a different question ; that the right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. Says the court : "If it [the statute] be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to every one when it declares that he has a 'natural, inalienable right' of 'acquiring, possessing, and protecting property.'" *Godcharles v. Wigman*, 113 Pa. St. 431, was an action brought by Wigman to recover wages as a puddler. Plea of payment, etc. During the time of his employment the plaintiff asked for, and received, orders from defendants on different parties for coal and other articles, which orders were honored by the parties on whom drawn, and the defendants paid them. It seems an Act of the Legislature made all orders given by employers engaged in the business of manufacturing, to their workmen, payable in goods, or anything but money, void. Speaking of these sections of the Act the court said : "They are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done ; that is, prevent persons who are *sui juris* from making their own contracts. The Act is an infringement, alike, of the right of the employer and employee. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal ; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." In *State v. Goodwill*, 33 W. Va. 179, a statute of that State prohibited persons engaged in mining and manufacturing from issuing orders in payment of labor, except such as should be made payable in money. It made a violation of its provisions a misdemeanor. The Constitution of that State declares that

all men have certain inherent rights; that is to say, "the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." The statute was held unconstitutional, after a full consideration. Says the court: "The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, which is, as we have seen, property, is protected by the Constitution." The scope of the opinion is well summarized in the headnote in these words: "It is not competent for the legislature, under the Constitution, to single out owners and operators of mines and manufacturers of every kind, and provide that they shall bear the burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make." And this ruling was followed and approved in *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188. The statute brought in question in *Millett v. People*, 117 Ill. 294, required all coal produced in the State to be weighed on scales to be furnished by the mine-owners, and subjected the mine-owner to a fine or imprisonment for a failure to comply with its provisions. By another section it was provided "that all contracts for the mining of coal, in which the weighing of the coal as provided for in this Act shall be dispensed with, shall be null and void." It was held that the mine-owners could not be compelled to make their contracts for mining coal so as to be regulated by weight; and that they could not be compelled to keep and use scales for such purposes, save when they saw fit to make contracts for mining on the basis of weight. The law was considered repugnant to the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law;" that to single out coal-mine owners, and prohibit them from making contracts which it was competent for other employers of labor to make, was not due process of law. And for like reasons the same court held an Act void which denied to persons and corporations engaged in mining and manufacturing the right to keep, or be interested in, a truck store for furnishing supplies, etc. *Froerer v. People*, 31 N. E. Rep. 395.

Some of the cases just cited cannot be distinguished from this one. In others, there is some difference in the facts, and in the statutes considered, and in some of them the constitutional provisions use different words from the clauses of our Constitution before set out; but the cases just cited are all, in point of principle, like the one in hand. The differences, such as they are, strengthen, rather than weaken, the conclusion which we have before expressed, for it must be evident that they all teach this doctrine: that constitutional declarations concerning the liberty of the citizen, though using different words, are not to be reduced to an empty sound. Liberty, we have seen, includes the right to acquire property, and that means and includes the right to make and enforce contracts. We do not say that such rights cannot be regulated by general law, but we do say that the legislature cannot single out

one class of persons, who are competent to contract, and deprive them of rights in that respect which are accorded to other persons. The constitutional declaration that "no person shall be deprived of life, liberty, or property without due process of law" was designed to protect and preserve their existing rights against arbitrary legislation, as well as against arbitrary executive and judicial Acts. The sections of our statute in question deprive a class of persons of the right to make and enforce ordinary contracts, and they introduce a system of State paternalism which is at war with the fundamental principles of our government, and, as we have before said, are not due process of law. It cannot be said that these defendants, in operating their coal mines, are pursuing a public business, or that they have in any way, shape, or form devoted their property to a public use; and, this being so, the cases of *Munn v. Illinois*, 94 U. S. 113, and *Budd v. New York*, 143 U. S. 517, are not in conflict with what we have said. On the contrary, the line of argument pursued in those cases goes far to show that a statute like the one in hand cannot stand. The many adjudications upholding police regulations need not be noticed, for it cannot be claimed that the law in question is of that character. The case of *Hancock v. Yuden*, 121 Ind. 366, goes far to support and uphold this law, but we cannot agree to the doctrine of that case. Slow as we are, and should be, to declare legislative enactment void, we can reach no other conclusion than that before expressed.

The judgment is reversed, and the defendants discharged. All concur, except BARCLAY, J., who dissents.

BARCLAY, J. The reasons of my learned associate, Chief Justice Black, for holding the statute unconstitutional, seem to me unsatisfactory, and the importance of the case warrants a statement of the grounds of dissent.

1. There is no issue touching the impairment of obligation of any contract concluded before the passage of the Act. The transactions in view occurred long afterwards. The only controversy now is whether or not the statute violates the guarantees of "liberty" and "property," and of "due process of law," on which the judgment of the majority of the court is placed. In the principal opinion it is conceded that the legislature has power to restrict freedom of contract in some directions, and in respect to certain parties; for example, "infants and insane persons." That concession may be taken as a starting-point for the present investigation; for when it is granted that liberty to make contracts is not absolute and unlimited, our difference is narrowed into the inquiry, what is the peculiarity of the subject-matter of the statute under review which exempts it from regulation by the law-making power?

One reason given for condemning the law before us is that the subjection of corporations, and other persons operating mines and manufacturing establishments, to such regulation, is a "purely arbitrary"

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classification ; therefore, an infringement of their constitutional liberty. Although that proposition seems a vital one to support the conclusion reached, it is said in another part of the opinion that " it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like." In this connection the Supreme Court has held (in a case which furnishes an elaborate list of instances of such legislation) that " class legislation is not necessarily obnoxious to the Constitution. It is a settled construction of similar constitutional provisions that a legislative Act which applies to and embraces all persons ' who are or who may come into like situations and circumstances ' is not partial." *Humes v. Railway Co.* (1884), 82 Mo. 231, cited recently and followed in an opinion by the present Chief Justice in *Perkins v. Railway Co.* (1891), 103 Mo. 56. To the same point, see *Budd v. New York*, 143 U. S. 517.

The law-maker necessarily deals with conditions as he finds them. If he observes, and wishes to abate, some fraudulent practice or abuse of power prevailing only in some one line of business, the fact that, in legislating to correct it, he does not also include in his remedy all other phases of human affairs, can furnish no reason for stigmatizing his remedy as no law at all. If an Act reaching only mining and manufacturing concerns is, on that account, not " due process of law," what must be held of statutes establishing special rules of liability, or business regulations, applicable to railroads only, to warehousemen, pawnbrokers, auctioneers, millers, and the many other classes of persons whose affairs form topics of treatment in separate laws? Are all such statutes void, because each relates to persons engaged only in the particular class of business named in it? Probably they would not be so held. Some of them are acted on and enforced almost daily. Yet if they are valid, what, let me ask, is there so exceptional about the truck system that precludes legislation applicable to those lines of business in which it prevails? If laws regulating the contracts of bankers (Revised Statutes 1889, § 706), common carriers (Id. § 944), mechanics (Id. § 6705), and insurance companies (Id. § 5856), as distinct classes of persons, are constitutional, and involve no invasion of their rights to " liberty or property," how can the position be maintained that such legislation, touching contracts of miners and manufacturers, invades these rights? The opinion certainly furnishes no reason, founded on any language of the Constitution, for nullifying the latter, while approving the former, statutes. It admits that " the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees." In *Durant v. Mining Co.* (1889), 97 Mo. 62, the same learned judge gave full effect to a statute " providing for the health and safety of persons employed in coal mines." Session Acts, 1881, p. 165.

If a law applicable only to persons engaged in mining is constitutional when dealing with the topic of their health and safety, it is obvious that an Act designed to prevent fraud or oppression in the payment of wages

by mining and manufacturing enterprises is not objectionable on the ground of the selection or "classification" of those enterprises as subjects for separate legislation.

Touching this particular point, the Supreme Court of the United States has said: "Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates." *Dent v. West Virginia* (1889), 129 U. S. 124. The same court has held that statutes creating a different rule of liability, as applied to one class of persons, from that generally in force, do not infringe the right to "due process of law." *Railway Co. v. Humes* (1885), 115 U. S. 512; *Railway Co. v. Mackey* (1888), 127 U. S. 205. And the Supreme Court of this State has determined that "a statute which relates to persons or things as a class is a general law, while a statute which relates to particular person or things of a class is special." *State ex rel. Lionberger v. Tolle* (1880), 71 Mo. 650. If the Act is invalid, it cannot be because it treats of mining and manufacturing concerns only. *In re Oberg* (1891), 21 Or. 406; *Youngblood v. Trust & Sav. Co.* (Ala., 1892), 12 South. Rep. 579.

2. The gist of the opinion is to be found in the ruling that the constitutional guarantee of "due process" condemns "arbitrary, unequal, and partial legislation;" that the statute in question is of that nature, and is therefore annulled as unconstitutional and void. With due respect for the judgment of my colleagues, that view appears to me erroneous. The Act, in part, was passed in 1881. It was amended in 1885, and re-enacted by the revision of 1889. It has thus received the sanction of the 31st, 33d, and 35th General Assemblies of Missouri and of Governors Crittenden, Marmaduke, and Francis, successively. Its plain purpose is to put some restraint upon that sort of freedom which would permit the employer to contract for labor, payable in goods, and then place his own prices upon the goods delivered in payment.

The general objects of such a law, as well as the principle upon which it rests, have been fully stated by English judges, having before them a British law of similar character, commonly called the "Truck Act." 1 & 2 Wm. IV. (1831), c. 37. "In passing the statute referred to, the legislature seems to have considered the artificer as requiring special protection in his dealings with his employers, and to have thought it right, therefore, to make the contracts between these parties one of the exceptions to the general rule that persons should be allowed to make their own contracts, in their own way. The particular evil to be remedied (and which, notwithstanding former enactments, still prevailed) was the truck system, or payment by masters of their men's wages wholly or in part with goods, — a system manifestly to the disadvantage of the workman, who was practically forced to take the goods at his master's valuation. In order to obviate this, the statute reciting 'that it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm,' by

section 1 enacts that any contract by which the whole or any part of the wages of the artificer is made payable in any other manner than in the current coin shall be null and void."—KEATING, J., in *Archer v. James* (1862), 2 Best & S. 73.

"The old truck enactments are very numerous, and date from about the year 1464 (4 Edw. IV.). They were applied first to one branch of manufacture, and then in succession to others, as experience and the progress of manufactures dictated, till they embraced the whole, or nearly the whole, of the manufactures of England. They established the obligation, and produced, or at least fortified, the custom, of uniformly paying the whole wages of artificers in the current coin of the realm. They were finally collected and consolidated into one Act by the statute now under consideration. 1 & 2 Wm. IV. c. 37. They were, in truth, part of a system of legislation regulating the relation of master and workman, this part of it being in favor of the workman, who, as an individual, was deemed weaker than his master, and therefore liable to oppression. . . . The Truck Act, when passed, was a practical deduction from a principle, still more general, pervading more or less all systems of law founded on experience; that is to say, that where two classes of persons are dealing together, and one class is, generally speaking, weaker than the other, and liable to oppression, either from natural or incidental causes, the law should, as far as possible, redress the inequality, by protecting the weak against the strong. On this principle rests the protection thrown around infants and persons of unsound or weak mind, the protection afforded even by the common law to the victims of fraud, and by the Court of Chancery at this day to heirs, expectants, and sellers of reversions against catching and unconscionable bargains, though entered into without fraud, and by persons of full age. No doubt all such legislation or judicial interposition is in many cases ineffectual. . . . The efficacy of such provisions must not be estimated by the abuses actually remedied, so much as by the abuses prevented by the knowledge that such is the law. So viewed, the Truck Act must have been deemed by the legislature which passed it a highly remedial statute, and is therefore now, as I admit, notwithstanding the penal clauses, to be construed liberally, so as to advance the supposed remedy, and suppress the supposed mischief."—BYLES, J., in *Archer v. James* (1862), 2 Best & S. 82. Some of the bargains referred to by that learned judge, as well as a great variety of other agreements, have been nullified by courts in this country, as well as in England, without the aid of statutes, on the ground that they were contrary to public policy (Greenhood on Public Policy), while judges possessing equity jurisdiction have for ages exercised, unquestioned, the power to declare agreements void between attorney and client, or between other persons occupying confidential relationships, where advantage was taken of the confidence to secure a bargain which the court considered unduly favorable to the dominant party thereto. In *The Juliana* (1822), 2 Dod. 504, Lord Stowell refused to enforce a

covenant between a mariner and his employer to the effect that the former should not be entitled to any part of his wages unless the ship should return to the last port of discharge. The decision is placed on the ground that, in view of the relative situation of the parties and the nature of the agreement, its effect was oppressive, and not enforceable in a court governed by the "rules of natural justice." So that at common law, in equity and in admiralty, the judiciary exercise the right to annul certain agreements because unfair and unconscionable; the principle of such rulings being that, in some circumstances, real contractual equality, or that entire freedom of action essential to the legal idea of a contract, is wanting.

It seems unreasonable to hold that the courts alone may determine what the public policy of a State shall be, respecting the validity of agreements between parties situated so that one may have an undue advantage over the other. Why has not the legislature power, by general law, operating on future dealings, to declare a similar public policy? The judgments of the courts above mentioned have never been considered an arbitrary infringement of the liberty of contract; nor should a statute, aimed at a system affording the opportunity for oppression described by the English judges quoted, be so considered.

Liberty, "on its positive side, denotes the fulness of individual existence; on its negative side it denotes the necessary restraint on all which is needed to promote the greatest possible amount of liberty for each." Amos, Science of Law, p. 90. Rational freedom is not a license to oppress. "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it." Mill, Liberty, c. 4. In our country the people have furnished a philosophic, as well as noble, manifestation of the true spirit of liberty, in those guarantees of individual and personal rights of the minority, by which the majority have imposed certain constitutional bounds to their own public action. They stand as barriers to encroachments upon the liberties so protected, but none of them purports to confer or secure absolute freedom of contract. Neither the State nor Federal Constitution so declares. Laws impairing the obligation of contracts are forbidden; but the interdiction stops at that. In *Railway Co. v. Gebhard* (1883), 109 U. S. 527, the United States Supreme Court held that but for the protection of the fundamental law the obligation of contracts was subject to legislative control, and was not secured by any general principles of jurisprudence outside the constitutional guarantee. The right to regulate contracts so as to mitigate the oppression of the truck system, without impairing the obligation of any existing agreement, is a part of the police power, "which is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the State, necessary for the public welfare." *People v. Budd* (1889), 117 N. Y. 14; the *License Cases* (1847), 5 How. 583.

By the Constitution of Missouri it is declared that "the exercise of

the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State." Article 12, § 5, Const. 1875.

The police power in recent years has been applied in many notable instances, where it was contended that the liberty of making contracts was not subject to limitation by the legislative power; but the courts of last resort have ruled against that contention in the *Granger Cases* (*Munn v. Illinois* [1876], 94 U. S. 113); in the *Bread Cases* (*Mayor v. Yuille* [1841], 3 Ala. 137; *People v. Wagner* [1891], 86 Mich. 594); and in the *Elevator Cases* (*People v. Budd* [1889], 117 N. Y. 14; *Budd v. New York* [1892], 143 U. S. 517; *State v. Brass* [1892], 2 N. D. 482. In *Water Works v. Schottler* (1884), 110 U. S. 347, 4 Sup. Ct. Rep. 48, it was said that government had power to regulate the prices at which water should be sold by one enjoying a virtual monopoly of the sale.

These decisions show that the right of self-preservation, which exists in the Commonwealth no less than in the individual, may, in some circumstances, justify limitations upon freedom of contract; and that when, for any reason (for instance, the existence of a monopoly), real liberty of action is wanting on the side of one of the parties, in dealings forming part of the activities of civilized society, a reasonable check may justly be placed by law upon the power of the other to oppress his fellow-citizen. Such checks upon liberty of contract have been sustained by the highest courts. Others involving the application of the same police power (though in less exigent circumstances) have been long in force in Missouri in many statutes, among which are especially noteworthy the laws fixing a maximum rate of interest for the use of money (Revised Statutes 1889, § 5972), giving mechanics a lien in certain circumstances (*Henry & Coatsworth Co. v. Evans* [1889], 97 Mo. 47), governing the liability of common carriers (Revised Statutes 1889, § 944), forbidding contracts to limit the time for bringing any action (*Id.* § 2394), putting into insurance contracts statutory terms, and nullifying "any stipulation in the policy to the contrary" (*Id.* § 5856, enforced by the United States Supreme Court in *Society v. Clements* [1890], 140 U. S. 226), and the laws establishing standards of weights and measures (Revised Statutes 1889, c. 170). The enactment before us comes very near to the class last named. Examining its terms (section 7058) closely, it will be observed that it merely impresses upon contracts for the payment of wages with goods, etc., certain statutory conditions, intended to give the employee an option to demand payment in cash or goods, as his interest may appear to require. As the employer fixes the price of the goods, he is not prejudiced by such a regulation. Its effect is to establish a just standard of value for every dollar due for wages. It does not differ in principle from governmental regulations in the form of laws by which a person who has contracted to receive a yard of cloth or a bushel of corn is protected against the

necessity of accepting such a short yard or light bushel as the seller may choose to impose upon him. Statutes designed to prevent that sort of overreaching have been universally regarded as proper exertions of the police power. *Charleston v. Rogers* (1823), 2 McCord, 495; *Stokes v. City of New York* (1835), 14 Wend. 87; *Green v. Moffett* (1856), 22 Mo. 529; *Yates v. Milwaukee* (1860), 12 Wis. 673; *Eaton v. Kegan* (1874), 114 Mass. 433.

In view of the onerous bearing of the truck system upon some of those whom it affects, in compelling them to accept payment for labor in articles whose value is determined by the party adversely interested in the bargain, this statute (which seeks to relieve against that hardship) should be held (no less than those already mentioned) "due process of law." Adam Smith, the great advocate of freedom of commerce, declared such legislation "perfectly just and equitable." Wealth of Nations, bk. 1, c. 10, approvingly quoted by Bramwell, J., in *Archer v. James* (1862), 2 Best & S. 89.

Whether or not that view is sound it is not our province to determine, for all question of the policy, wisdom, or expediency of the law belongs to other departments, not to the judiciary. The people, in the exercise of the prerogative of self-government, have thought proper to establish a rule of conduct on the subject which appeared to them conducive towards maintaining the equilibrium of right and duty between citizens whose common welfare was important to the State. No express command of the Constitution forbade such action, and in my judgment it should be sustained.

3. In his opinion the learned Chief Justice adopts a quotation to the effect that an Act of the Legislature may "transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict." That view of the extent of the revisory power of the Supreme Court over Acts of the General Assembly has not previously prevailed in Missouri. It is in conflict with several precedents. In *County Court v. Griswold* (1874), 58 Mo. 192, it was declared: "That the law is unjust, or impolitic, or oppressive will not authorize a court to declare it illegal, unless it violates some specific provision of the Constitution. . . . A law may be unjust in its operation, or even in the principles upon which it was founded, but that would not justify a court in expanding the prohibitions of the Constitution beyond their natural and original meaning, in order to remedy an evil in any particular case. These principles have now become axiomatic." To the same purport is *Hamilton v. County Court* (1851), 15 Mo. 3. Each of these decisions was given under a constitution containing language the same as that now in force concerning "due process." Afterwards, that language was repeated in the present Constitution; hence that construction of the language, according to a recognized rule of interpretation, should be taken to have been adopted with it when the new Constitution went into force, in 1875. *Gas Co. v. Higby* (1890), 134 Ill. 557; *People v. O'Brien*

(1892), 96 Cal. 171. The latter instrument, as though to give emphasis to that construction, provides that the legislative power is vested in the General Assembly, "subject to the limitations herein contained." Constitution 1875, Article 4, § 1. See, also, the later case of *Phillips v. Railway Co.* (1885), 86 Mo. 540. The spirit and intent of terms used in the Constitution are, no doubt, as much a part of it as its letter, and should be considered in its interpretation. But that is a rule essentially different from the proposition that a statute may be pronounced void because it appears to some court to be in conflict with the supposed general spirit or principles of free government, not expressed in any particular provision of the Constitution. To that proposition, or any approach towards declaring it, my dissent is earnestly entered.

The authority of the court is drawn from the organic law, which asserts the independence of the three departments of government (Const. 1875, art. 3), and the power of each is marked by the terms of that instrument.

It has heretofore been considered settled that all action of the legislative department comes within range of the presumption that public officers have rightly acted, until the contrary is made clearly to appear; consequently, that "a party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving beyond doubt that it is so." *State v. Addington* (1882), 77 Mo. 110; *State v. Laughlin* (1881), 75 Mo. 147. But now a majority of the court sanctions the idea that some legislation is not to be considered as *prima facie* constitutional, but calls for a showing of "specific authority" to sustain it. Such a doctrine (reversing the presumption of the validity of statutes), coupled with the other proposition already discussed in this paragraph, subjecting every Act of the General Assembly to the hazard of being declared void, "though no express constitutional provision could be pointed out with which it would come in conflict," furnishes a very interesting formula to determine the constitutionality of legislation, but one quite different from that defined in former precedents in this State. It amounts, in substance, to a declaration that statutes which seem to the court unjust or unreasonable are not "due process of law," though not otherwise distinctly forbidden by the Constitution.

To catch the full force of this ruling, it will be well to recall that the guarantee of "due process" is now a part of the Fourteenth Amendment to the Federal Constitution, as well as of our own organic law; so that the test of the validity of Missouri legislation is to be whether or not it conforms to the standard of reasonableness indicated by the Chief Justice, as applied by the Federal courts, as well as by our own. It would greatly prolong this opinion to point out the far-reaching consequences of adopting such a standard, and its wide divergence from the principles of republican government through co-ordinate departments, as established by our written constitutions. It is enough now to assert a dissent to those views of the organic law, as well as to the judgment in this case to which they have led.

4. Some decisions elsewhere have been cited to sustain the conclusion of my colleagues. The Pennsylvania case should be read along with the later one, in which it was held that the legislature might, under the police power, interfere with freedom of contract to the extent of forbidding totally the sale of an article of food, even though pure and wholesome. *Powell v. Com.* (1886), 114 Pa. St. 265. Judge Gordon, who wrote the former decision, dissented from the latter; but it was affirmed (1888) by the United States Supreme Court. 127 U. S. 678. In a yet later unanimous opinion in that State, a statute was held valid, prohibiting citizens from assigning certain claims against others, for the purpose of suit in another State. *Sweeney v. Hunter* (1891), 145 Pa. St. 363. The West Virginia case cited by the Chief Justice has been much limited, if not overruled, by *State v. Coal Co.* (1892), 36 W. Va. 802; and the Massachusetts decision was by a divided court. The cases in Illinois are placed chiefly on the ground that it is unconstitutional to establish rules to govern mining and manufacturing concerns different from those which regulate other legitimate enterprises. To that contention the remarks in the first paragraph above are intended to apply. Moreover, the legislation considered in that State differs in important particulars from that here in view.


On the other side, *Hancock v. Yulen* (1890), 121 Ind. 366, supports the position taken in this opinion. In *State v. Manufacturing Co.* (R. I., 1892), 17 L. R. A. 856 [25 Atl. Rep. 246], a law requiring the payment of wages weekly was held valid; and the principles declared in the decisions sustaining statutes prohibiting the manufacture and sale of oleomargarine are wholly inconsistent with the judgment of the majority of the court in the case at bar. *State v. Adlington* (1882), 12 Mo. App. 214, affirmed (1882) 77 Mo. 110; *Powell v. Pennsylvania* (1888), 127 U. S. 678; *Butler v. Chambers* (1886), 36 Minn. 69.

5. It has been suggested in the main opinion, as well as at the bar, that the statute in question is subject to criticism as being an exhibition of paternalism in government. To this it may properly be answered that that consideration affects only the policy of the statute, and not the constitutional power of the legislature to enact it. Students of juridical history are aware that governmental interferences with liberty of contract between man and man are less frequent now than in earlier epochs of the English law. Spencer, "Justice," ch. 15, sec. 70; Maine, *Ancient Law*, 3 Am. ed., ch. 9, p. 295. But the power to interfere when necessary to prevent oppression is an important prerogative of sovereignty, and resides in the people of this State, subject only to the limitations expressed in their constitutions. The cure for paternal legislation is not to be found in an assumption by the courts of any part of the power of self-government belonging to the people or their representatives. To borrow the words of Mr. Justice Harlan in the United States Supreme Court, referring to the oleomargarine law: "If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomar-

garine as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government." *Powell v. Pennsylvania* (1888), 127 U. S. 686.

When the present case was in the second division of the court, an able opinion was rendered by Judge Thomas (*State v. Loomis* [1892], 20 S. W. Rep. 332), affirming the judgment of Judge Ellison on the circuit. The result then announced appears to me correct.¹

¹ Compare *Hewlett v. Allen*, [1892] 2 Q. B. 662, in which the English Truck Acts were applied. By a recent Act, St. 50 & 51 Vict. c. 46, s. 6, it was provided that "No employer shall directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman any terms as to the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid to the workman are or is to be expended, and no employer shall, by himself, or his agent, dismiss any workman from his employment for or on account of the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid by the employer to such workman are or is expended or fail to be expended." — ED.



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